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# FEDERAL ACKNOWLEDGMENT ADMINISTRATIVE PROCEDURES ACT OF 1989

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# HEARING

BEFORE THE

## SELECT COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

## S. 611

TO ESTABLISH ADMINISTRATIVE PROCEDURES TO DETERMINE THE STATUS OF CERTAIN INDIAN GROUPS

MAY 5, 1989
WASHINGTON, DC

PART 2

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# FEDERAL ACKNOWLEDGMENT ADMINISTRATIVE PROCEDURES ACT OF 1989

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FRIDAY, MAY 5, 1989

U.S. Senate,
Select Committee on Indian Affairs,
*Washington, DC.*

The committee met, pursuant to notice, at 9:30 a.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, McCain, Reid, Gorton, Cochran, and Murkowski.

## STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The Chairman. The committee will come to order.

I thank all of you for attending this hearing on S. 611, a bill to provide a statutory basis for establishing administrative procedures to clarify the relationship between the United States and certain Indian groups. S. 611 would establish an independent Office of Federal Acknowledgment that is intended to remain free from political pressures. It would create an appeals panel which will be knowledgeable in anthropology, history, and the law regarding Indians. S. 611 proposes a separate procedure for petitioners that are recognized by law but which are not currently acknowledged by the Federal Government. The bill will authorize funds for the Department of the Interior and the petitioners to carry out the purposes of the bill.

Last week, the committee held a field hearing in Sacramento, CA, on S. 611 and received testimony on the bill from over 50 witnesses representing unrecognized tribes in the State of California. The history of Federal Indian policy in California is another sad chapter in Federal Indian relations, in which 18 treaties were entered into with California tribes that relinquished their ancestral lands, only to have the treaties shelved when they were sent to Washington, and never ratified by the Senate. Although there were many attempts to break up traditional groups and to scatter Indian people to various parts of the State, it is a testament to the tenacity of California Indians, that despite the concerted efforts to terminate them, they continue to maintain their tribal identity. Their testimony makes clear the need for legislation that will establish an orderly process that will treat all petitioning groups in a consistent manner, recognizing that many of these groups had government-to-government relations with the United States early in this Nation's history.

Today, we look forward to receiving the testimony of many distinguished witnesses, including that of our friend and former colleague, Senator Jim Abourezk, under whose chairmanship this committee first began to seek a solution to the Federal acknowledgment problem. We will also receive the views of the Administration, several Indian tribes, experts in the fields of anthropology, history, and the law, and from the working group which was asked to develop this legislation.

As many of you know, Senator McCain, the vice chairman of this committee, has introduced S. 912, an alternative approach to achieving the objectives that are proposed in S. 611. Accordingly, the committee will be pleased to receive any testimony that witnesses may wish to provide regarding the merits of S. 912 as well.

We look forward to receiving your testimony on these very important matters and receiving any written testimony you would like to submit for the record.

I now recognize the distinguished Senator from Arizona, Senator McCain.

[Text of S. 611 follows:]

II

101st CONGRESS
1st Session

# S. 611

To establish administrative procedures to determine the status of certain Indian groups.

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IN THE SENATE OF THE UNITED STATES

March 16 (legislative day, January 3), 1989

Mr. Inouye (for himself, Mr. Breaux, Mr. D'Amato, Mr. Dodd, Mr. Hatfield, Mr. Johnston, Mr. Levin, Mr. Packwood, Mr. Pell, Mr. Riegle, Mr. Sanford, and Mr. Shelby) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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# A BILL

To establish administrative procedures to determine the status of certain Indian groups.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SHORT TITLE

Section 1. This Act may be cited as the "Indian Federal Acknowledgment Administrative Procedures Act of 1989".

## FINDINGS

Sec. 2. The Congress finds that—

(1) the first Congress, by enacting the Act of July 22, 1790 (1 Stat. 137; ch. 33), recognized a spe-

cial government-to-government relationship with all of the Indian tribes of the United States, whether or not the Indian tribes subsequently entered into special treaty relations with the United States;

(2) since 1978, the Secretary of the Interior, without specific Congressional direction and authority, has been reviewing, evaluating, and determining whether particular Indian groups, whose status has been in question for various reasons, should be acknowledged as Indian tribes by the Federal Government;

(3) the status of other Indian groups has been acknowledged, restored, or defined by legislative or judicial action, creating the possibility of inconsistent standards;

(4) satisfactory administrative resolution of Indian tribal status questions has been frustrated by inadequate staffing resulting in delays of 8 years or more in processing individual petitions, by inadequate financial resources for research by petitioners, and by a failure to fully protect a petitioner's right to due process and objective administrative review and appeal;

(5) a majority of the petitions for acknowledgment received by the Secretary of the Interior since 1978 are still awaiting active consideration; and

(6) there is an urgent need to strengthen and expedite the administrative process and to clarify the eligibility of Indian groups to be acknowledged as Indian tribes.

PURPOSES

SEC. 3. The purposes of this Act are—

(1) to reaffirm the plenary authority of Congress in the acknowledgment of relationships with Indian tribes and in the fulfillment of the United States trust responsibilities to Indians;

(2) to ensure that the special government-to-government relationship between the United States and Indian tribes has a consistent legal and historical basis based on the inherent sovereignty of Indian tribes;

(3) to establish just, clear, and consistent standards for the administrative acknowledgment of Indian tribal status which ensure that all Indian tribes are accorded equal treatment; and

(4) to expedite the equitable resolution of questions of Indian tribal status by establishing an independent administrative process with adequate staff and resources to process petitions within reasonable time limitations.

DEFINITIONS

SEC. 4. For purposes of this Act—

(1) The term "Indian" means any individual (including any Alaska Native (within the meaning of section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)) whose ancestors were indigenous to at least some part of the United States at a point in time prior to the establishment of permanent settlements by Europeans in that area.

(2) The term "autonomous" means essentially distinct from any other Indian tribe, notwithstanding those social, economic, or other relations as may have been customary among different Indian tribes in the petitioner's region.

(3) The term "Panel" means the Federal Acknowledgment Appeals Panel established under section 6 with respect to a ruling on a petition.

(4) The term "community" means the existence of a network or networks of social interaction among tribal members differentiating members from nonmembers, with due regard to the size, geographic proximity, relative isolation, and institutional character of the group.

(5) The term "continual" means extending from generation to generation, from historical times to the present, essentially without interruption. If a group demonstrates a fact or status at one point in time and

at a later point in time, but no more than fifty years later, continuity of that fact or status will be presumed for the intervening period, absent proof to the contrary.

(6) The term "Director" means the Director of the Office of Federal Acknowledgment.

(7) The term "historical times" means the later of—

(A) 1790, or

(B) the earliest period of sustained contact between the Indian tribe and permanent non-Indian settlements.

(8) The term "Office" means the Office of Federal Acknowledgment.

(9) The term "official roll" means any roll, list or census of Indians prepared or approved by the Secretary of the Interior, or by a court or legislatively-constituted tribunal of the United States, including rolls prepared or approved for the purposes of judgment distributions or the allotment of lands held in trust.

(10) The term "treaty" includes—

(A) treaties made by the United States with, on behalf of, or concerning, aboriginal or Indian tribes;

(B) agreements for the cession of land made by the United States with Indian tribes after March 3, 1871;

(C) treaties made by any sovereign from which the United States acquired territory by either purchase or cession; and

(D) treaties negotiated by the United States with, or on behalf of, Indian tribes in California, whether or not such treaties were subsequently ratified.

(11) The term "interested party" means the State, States, or political subdivisions of a State, in which the principal office, community, or tribal property interests, if any, of the petitioner are located, as well as any Indian tribes whose property or interests may be directly affected by acknowledgment of the petitioner as an Indian tribe.

(12) The term "Secretary" means the Secretary of the Interior.

(13) The term "acknowledgment" means a determination by the Department of the Interior that a group of Indians constitutes an Indian tribe entitled to participate in a government-to-government relationship with the United States on an equal basis with all other Indian tribes recognized as eligible for the special pro-

grams and services provided by the United States to Indians because of their status as Indians.

(14) The term "acknowledge" means to make, on behalf of the Department of the Interior, the determination described in paragraph (13).

(15) The term "Indian group" means any aggregation of Indians that is not acknowledged by the Department of the Interior to be an Indian tribe.

(16) The term "petitioner" means any Indian group that submits a petition for acknowledgment that the Indian group is an Indian tribe.

(17) The term "petition" means a petition for acknowledgment that an Indian group is an Indian tribe.

(18) The term "pending petition" means a petition that—

(A) is submitted to the Bureau of Indian Affairs or to the Director,

(B) has not been finally determined, and

(C) is either awaiting, or has already been the subject of, a letter citing obvious deficiencies or significant omissions.

## OFFICE OF FEDERAL ACKNOWLEDGMENT

SEC. 5. (a) There is hereby established within the Department of the Interior an office to be known as the "Office of Federal Acknowledgment", which shall be under the supervision and direction of the Director of the Office of Federal Acknowledgment.

(b)(1) The Director of the Office shall be appointed by the President by and with the advice and consent of the Senate. The Director shall—

(A) be a person familiar with the historical, anthropological, and legal problems of Indian groups,

(B) be appointed without regard to political affiliation, and

(C) be removable for cause.

(2) The term of office of the Director shall be 6 years.

(3) The Director shall be responsible for day-to-day administration of the Office, hiring, discharge, and supervision of staff, financial management, and such other activities as may be necessary to carry out the duties of the Director under this Act.

(4) The Director shall appoint the staff of the Office pursuant to the provisions of title 5, United States Code, governing appointments in the competitive service. The Director shall employ sufficient anthropologists, historians, and support staff to complete preliminary review of all petitions filed under this Act and to comply with the time limitations imposed under this Act.

(c) The Director shall review all petitions submitted to, or transferred to, the Director under this Act.

(d)(1) Upon the request of the Director, the head of any Federal agency is authorized to detail personnel temporarily to the Office to assist the Director in carrying out the duties of the Director under this Act, unless otherwise prohibited by law. The Director may also procure temporary and intermittent services under section 3109(b) of title 5, United States Code.

(2) Upon request of the Director, the head of any department or agency of the United States shall furnish such information as the Director deems necessary to enable the Director to carry out the duties of the Director under this Act, unless otherwise prohibited by law. The Director shall report any failure to comply with this subsection to the Congress in any report submitted under section 11.

### APPEALS PANELS

SEC. 6. (a)(1) The Secretary shall compile a list of candidates to serve on Federal Acknowledgment Appeals Panels. The number of individuals on the list shall be at the discretion of the Secretary.

(2) The individuals placed on the list described in paragraph (1) shall be experienced scholars in anthropology and the history of the United States who have established national reputations.

(b)(1) Within 45 days of the receipt of comments challenging a ruling pursuant to section 8(e) or 9(d), the Secretary shall appoint 3 individuals from the list described in subsection (a)(1) to serve on a Panel to review the ruling. No appointment shall be made if the petitioner objects under section 9(e) to the referral of the ruling to a Panel.

(2) The Secretary shall—

(A) exercise discretion in appointing individuals to a Panel in order to avoid any appearance of impropriety or a conflict of interest based on any recent contractual employment with the United States, and

(B) strive to ensure that each Panel reflects a broad range of historical and anthropological expertise.

(3) Each petitioner may reject the appointment of one individual to a Panel. If such right of rejection is exercised, the Secretary shall select a substitute from the list described in subsection (a)(1) in order to ensure that each Panel has 3 members.

(c) Each Panel shall establish its own meeting schedule and methods of work. Meetings of a Panel to make a decision shall be public, and opinions of any Panel shall be matters of public record, but a Panel may hold meetings in executive session.

(d)(1) Except as provided in paragraph (2), members of each Panel shall be paid reasonable compensation fixed by the Secretary, together with reimbursement for any expenses incurred by reason of their service on a Panel.

(2) Any member of a Panel who is otherwise employed by the Federal Government (including an employee of the Smithsonian Institution) shall not receive additional compensation for service on a Panel, but shall be eligible for reimbursement of expenses incurred by reason of such service.

### PETITIONS FOR ACKNOWLEDGMENT OF STATUS

SEC. 7. (a)(1) Any Indian group which satisfies the criteria set out in subsection (c) or (d), including any Indian tribe subject to any statute which terminates, or prohibits, any special relationship between the Federal Government and the Indian tribe, may submit a petition to the Director seeking acknowledgment that the Indian group is an Indian tribe. The petition may, at the election of the petitioner, be submitted under the criteria set out in subsection (c) or under the criteria set out in subsection (d).

(2) The provisions of this Act shall not apply to—

(A) splinter groups, political factions, communities, or groups of any character which separate from the main body of an Indian tribe after the Indian tribe has been acknowledged as being an Indian tribe by the Federal Government, unless it can be clearly established that the group has functioned from historical times until the present as an autonomous Indian tribal entity, or

(B) an indigenous nation, tribe, band, village, community or organized Indian group acknowledged as an Indian tribe by the Federal Government on the basis of the lists published in the Federal Register by the Assistant Secretary of the Interior for Indian Affairs on July 10, 1986, of Indian tribal entities, including Native tribal entities within the State of Alaska, and including tribes that have been acknowledged by the Federal Government between that date and the date of enactment of this Act that are recognized and eligible to receive services from the Bureau of Indian Affairs.

(b)(1) A petition for acknowledgment may be in any readable form which clearly indicates that it is a petition for acknowledgment under either subsection (c) or (d).

(2) A petition for acknowledgment under this section shall be accompanied by a copy of the petitioner's current governing documents or, in the absence of written documents, a statement explaining the membership criteria and the procedures by which the petitioner currently governs its affairs and determines its membership. The petition shall also be accompanied by a list of all known members, based on the petitioner's own membership criteria and procedures.

(c) A petition for acknowledgment under this subsection must contain information sufficient to establish that the petitioner satisfies each of the following criteria:

(1) The petitioner, or the members of the petitioner, have been identified from historical times until the present, on a continual basis, as Indians. This criterion is conclusively demonstrated by documentation of identification by Federal officials of the petitioner as Indians, or of the existence of a government-to-government, political, or administrative relationship with the United States, or a territory, but only for such times as that identification or relationship is documented. In the absence of such documentation, this criterion may also be demonstrated by the exercise of—

(A) a political relationship with a State, political subdivision of a State, parish, or other local government;

(B) identification as Indians in courthouse, church, or school records, newspapers or books;

(C) identification as Indians by anthropologists, historians, or other scholars; or

(D) identification as Indians by Indian tribes or national Indian organizations.

(2) A substantial portion of the members of the petitioner form a community, as determined by methods customarily employed by social scientists, including but not limited to field research, oral history, kinship analysis, studies of residence patterns, and statistically-

reliable survey techniques. This criterion is conclusively demonstrated by evidence that a substantial portion of the members of the petitioner have continually resided in a specific geographic area which formed at least a part of its territory from historical times. Such territory may include a specific geographic area to which the petitioner was removed, whether voluntarily or involuntarily.

(3) The petitioner has maintained tribal political influence or some other form of authority over its members as an autonomous entity continually from historical times to the present. This criterion can be demonstrated for a particular point in time by showing that the petitioner formed a community at that time.

(4) Not less than 75 percent of the current members of the petitioner are descendants of members of the historical Indian tribe with respect to which the petitioner bases its claim for acknowledgment, or of Indian tribes allied with, or related to, that historical Indian tribe. Official rolls constitute conclusive proof of ancestry. Other proof of ancestry includes—

(A) Federal, State, and other government records,

(B) church and school records, and

(C) affidavits prepared by tribal elders or the governing body of the Indian group.

(5) The membership of the petitioner is composed principally of persons who are not enrolled members of any other Indian tribe.

(d)(1) A petition for acknowledgment under this subsection must contain information sufficient to establish that the petitioner satisfies each of the following criteria:

(A) Not less than 85 percent of the current members of the petitioner are descendants of members of the historical Indian tribe with respect to which the petitioner bases its claim for acknowledgment. Official rolls constitute conclusive proof of ancestry. Other proof of ancestry includes—

(i) Federal, State, and other government records,

(ii) church and school records, and

(iii) affidavits prepared by tribal elders or the governing body of the Indian tribe.

(B) The membership of the petitioner is composed principally of persons who are not enrolled members of any other Indian tribe.

(C) The petitioner—

(i) was a party to a treaty or a successor in interest to a party to a treaty (including any

Indian groups found to be such a successor by the Indian Claims Commission or the United States Claims Court),

(ii) was identified in an Act or resolution of the Congress, or of the Continental Congress, in such a way as to establish or acknowledge a government-to-government relationship,

(iii) was the beneficiary of—

(I) an Executive Order setting aside land as an Indian reservation,

(II) any other land or property held in trust by the United States for petitioner or for the members of the petitioner, or

(III) any land or property subject to restrictions on alienation imposed by Federal law on the lands or property of Indians or Indian tribes,

(iv) was terminated as an Indian tribe by a Federal statute,

(v) was organized under the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461, et seq.) through the adoption of a constitution and bylaws pursuant to section 16 of such Act that were ratified and approved by the Secretary,

(vi) voted, or was scheduled to vote, on whether to accept the provisions of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461, et seq.), or

(vii) was the subject of a Federal statute that extinguished, compensated, or confirmed a claim of the petitioner to an interest in land.

(2)(A) A petition which satisfies the criteria in paragraph (1) creates a presumption that the petitioner was previously acknowledged as an Indian tribe by the United States and shall be acknowledged as such under this Act. Once such a presumption is created, the burden of proof shall be upon the Director to rebut the presumption.

(B) The presumption described in subparagraph (A) may be rebutted only by documentary evidence which—

(i) contradicts all, or substantially all, of the evidence submitted by the petitioner, or

(ii) demonstrates that the petitioner permanently abandoned tribal relations or fails to constitute a contemporary community.

The Panel may afford the petitioner an opportunity to respond to such documentary evidence.

(e) In resolving any question of fact in the application of the criteria under this section, a matter shall be deemed to have been proven as fact if the petitioner, or the Director under subsection (d)(2)(B), shows the matter to be more likely true than not. All evidence shall be interpreted in the context of the culture and social organization of the Indian tribes in the geographical and cultural area of the petitioner.

(f) The Director may, for good cause, waive the percentage requirements of subsection (c)(4) or (d)(1)(A) if the petitioner demonstrates that a substantial portion of the members of the petitioner are described in such subsection.

### REVIEW PROCEDURES FOR SECTION 7(C) PETITIONS

SEC. 8. (a) The procedures set forth in this section apply to the review of petitions under section 7(c).

(b) By no later than the date that is 90 days after the date on which the petition is submitted to the Director under section 7 or 14(a)(1), the Director shall notify the petitioner in writing as to whether or not there are any obvious deficiencies or significant omissions in the evidence submitted. This notice shall include suggestions for additional research to meet obvious deficiencies or significant omissions, if any, as well as an outline and methodology of any research which will be conducted by the Office to evaluate the petition.

(c) Active consideration of the petition by the Office shall begin by no later than the date that is 90 days after—

(1) the date on which the notice that there are no obvious deficiencies or significant omissions is transmitted under subsection (b), or

(2) if there are obvious deficiencies or significant omissions in the evidence submitted by the petitioner, receipt of the petitioner's final response to the notice transmitted under subsection (b).

(d) By no later than the date that is 180 days after the date on which active consideration of a petition begins, the Director shall make a preliminary ruling on the petition, publish the preliminary ruling in the Federal Register, and provide the petitioner with a detailed written explanation of the grounds upon which the ruling was based. If the preliminary ruling is to deny acknowledgment, the explanation shall include specific findings on each of the criteria contained in section 7(c) and references to all published works, and copies of all unpublished documents and research data, produced or consulted by the Office in considering the petition.

(e) During the 90-day period beginning on the date on which the preliminary ruling is published under subsection (d), the petitioner or any interested party may submit to the Director written comments on the preliminary ruling. Upon request, the petitioner shall be granted an additional 90 days to comment on the ruling.

(f) After publication of a preliminary ruling under this section that denies acknowledgment, the petitioner may request cooperative reconciliation under section 12(a). Cooperative reconciliation under section 12(a) shall suspend the running of the periods of time within which actions are required to be taken under this section for no more than 120 days. The Director may reverse the preliminary adverse ruling if cooperative reconciliation resolves the issues between the petitioner and the Office. Such a reversal shall constitute final agency action.

(g) If not challenged by the petitioner or an interested party within the time provided for comment, the preliminary ruling on the petition shall become final and shall not be subject to judicial review. Notice that the ruling has become final shall be published in the Federal Register within 60 days of the expiration of the time provided for comment.

(h) If the petitioner or an interested party challenges the preliminary ruling on the petition during the comment period, the ruling shall be referred to the Panel for review.

(i) If the Director fails to take the actions required under subsections (b) and (d) with respect to a petition on or before the date on which such actions are required to be taken, the petitioner shall be considered to be acknowledged by the Director as an Indian tribe on the day after such date.

## EXPEDITED REVIEW PROCEDURES FOR SECTION 7(d) PETITIONS

SEC. 9. (a) The procedures set forth in this section shall apply to the review of petitions under section 7(d).

(b) By no later than the date that is 45 days after the date on which a petition is submitted to the Director under section 7 or 14(a)(1), active consideration of the petition by the Director shall begin.

(c)(1) By no later than the date that is 120 days after the date on which active consideration of the petition begins, the Director shall—

(A) make a preliminary ruling on the petition which either acknowledges the petitioner or rebuts in accordance with section 7(d)(3) the evidence submitted by the petitioner, and

(B) publish the preliminary ruling in the Federal Register.

(2) If the Director makes a preliminary ruling under paragraph (1) to deny acknowledgment, the Director shall provide to the petitioner, at the time such ruling is published, a detailed written explanation of the grounds upon which it was based, together with copies of all documents produced or consulted by the Office in considering the petition.

(d) During the 45-day period beginning on the date on which the preliminary ruling is published under subsection (c), the petitioner or any interested party may submit to the Director written comments on the preliminary ruling. Upon request, the petitioner shall be granted an additional 45 days to comment on the ruling.

(e) A preliminary ruling under this section that denies acknowledgment shall be referred to the Panel, unless the petitioner submits to the Director a written objection to such referral during the 30-day period beginning on the date on which the preliminary ruling is published in the Federal Register.

(f) If not referred to the Panel, the preliminary ruling of the Director is not subject to judicial appeal. The petitioner may instead submit a petition to the Director for acknowledgment under section 7(c).

(g) If the Director fails to take the actions required under subsections (b) and (c) with respect to a petition on or before the date on which such actions are required to be taken, the petitioner shall be considered to be acknowledged by the Director as an Indian tribe on the day after such date.

### APPEAL

SEC. 10. (a) The Panel shall review the record with respect to the ruling referred to the Panel and submit its findings and opinion to the petitioner, the Director, and the Secretary in writing as soon as practicable, but by no later than the date that is 6 months after the date on which the Panel is established pursuant to section 6(b). The record before the Panel shall, at a minimum, include—

(1) the petition for acknowledgment and supporting documentation,

(2) the obvious deficiency or significant omissions letter and response to it, if an

(3) the preliminary ruling, all material upon which the ruling was based (including files and pertinent documents), and

(4) written comments pursuant to subsection 8(e) or 9(d).

(b) The findings and opinion of the Panel shall be published by the Director in the Federal Register and shall state in detail the grounds on which the Panel either concurs in, or disagrees with, the ruling made by the Director.

(c)(1) If the Panel disagrees with the ruling made by the Director, the appeal shall be referred to the Secretary.

(2) The Secretary shall review the conflicting rulings of the Director and the Panel and shall, by no later than the date that is 90 days after the date on which the findings of the Panel are submitted to the Secretary, make a decision with regard to the petition and publish the decision in the Federal Register.

(3) The publication of the decision of the Secretary shall constitute final agency action for the purpose of judicial review.

(4) No new grounds for denial of the petition may be raised by the Secretary in the decision made by the Secretary under paragraph (2).

(d) If the Panel fails to take the actions required under subsection (a), or the Secretary fails to take the actions required under subsection (c)(2), with respect to a petition on or before the date on which such actions are required to be taken, the petitioner shall be considered to be acknowledged by the Secretary on the day after such date.

### REPORT TO CONGRESS

SEC. 11. (a) By no later than the date that is 60 days after the date on which the first Director is appointed, the Director shall prepare and submit to the Congress a report on the status of all pending petitions. The report shall also include a plan for determining the approximate order in which all pending petitions will be reviewed in accordance with section 14.

(b) After the report required under subsection (a) is submitted, the Director shall submit an annual report to the Chairman of the Senate Select Committee on Indian Affairs of the Senate and the Chairman of the Committee on Interior and Insular Affairs of the House of Representatives containing—

(1) a list of all petitions which have been submitted,

(2) the order in which these petitions will be considered,

(3) the current status of each petition within the review process,

(4) the number of times that the time limitations imposed by sections 8, 9, and 14 of this Act have been

violated, together with the reason for each violation, and a summary of actions taken, or to be taken, by the Director to ensure compliance with these time limitations in the future, and

(5) a list of all Indian tribes that are currently acknowledged under this Act or under any other provision of law, including any tribe, band, or other group of Alaska Natives which operates under the authority of a council.

GENERAL PROVISIONS

SEC. 12. (a) The Director shall establish an administrative procedure for the cooperative reconciliation of disagreements of fact or law at the option of the petitioner. This procedure shall be designed to provide the staff of the Office, and persons performing research for the petitioners, with an opportunity, in an informal and non-adversarial manner, to—

(1) seek agreement on the interpretation of the evidence which was submitted or which may be available,

(2) review the adequacy and consistency of their research methodologies, and

(3) consider resolving any remaining issues of fact through cooperative research activities.

(b) In reviewing petitions for acknowledgment, the Director may consider material evidence from any reliable source, but copies of such evidence shall be supplied to the petitioner.

(c) For purposes of judicial review, the petitioner shall be considered to be the only party of record.

(d) The Director shall give priority to the consideration of petitions in the following order:

(1) petitions that were pending petitions on the date of enactment of this Act and in which the petitioner has elected to seek acknowledgment under section 7(d),

(2) all other petitions that were pending petitions on the date of enactment of this Act,

(3) petitions for acknowledgment under subsection (c) or (d) of section 7 that are submitted to the Director after the date of enactment of this Act by a petitioner who has not previously submitted a petition for acknowledgment under section 7(d) that was denied, and

(4) petitions for acknowledgment under section 7(c) that are filed by a petitioner whose previous petition for acknowledgment under section 7(d) was denied.

(e) The acknowledgment of a petitioner as an Indian tribe under this Act shall not have the effect of depriving any other Indian tribe of—

(1) any interest in land held in trust by the United States for the benefit of the other Indian tribe prior to the acknowledgment, or

(2) the authority the other Indian tribe has prior to the acknowledgment to exercise governance over those interests.

(f) Nothing in this Act may be construed to prejudice any claim against the United States for breach of any trust responsibility or for the wrongful withholding of services or benefits due to any Indian or Indian tribe.

ASSISTANCE TO PETITIONERS

SEC. 13. (a)(1) The Commissioner of the Administration for Native Americans of the Department of Health and Human Services shall make grants to enable Indian groups seeking acknowledgment to—

(A) conduct the research necessary to substantiate petitions under this Act, and

(B) to maintain essential tribal government functions while a petition is under consideration under this Act.

(2) The grants made under this subsection shall be in addition to any other grants the Commissioner of the Administration for Native Americans is authorized to provide under any other provision of law.

(b)(1) Grants provided under subsection (a) shall be awarded competitively based on objective criteria. A panel of three individuals shall review and rank each application.

(2) Preference shall be given in the awarding of grants under subsection (a) to applicants who have a pending petition before the Director.

(3) Grants shall not be made under subsection (a) to any group that has previously petitioned for acknowledgment by the Federal Government that the group is an Indian tribe if the petition was submitted under a different name and the group was denied such acknowledgment.

## TRANSITIONAL PROVISIONS

SEC. 14. (a)(1) All petitions for acknowledgment shall be transferred to the Director by no later than the date that is 30 days after the date on which the first Director is appointed. The Director shall provide written notice of such transfer and of the options available under this Act to each petitioner who submitted such a petition. Except as provided in subsection (b)(2)(B), each of such petitioners shall elect whether the petition is to be considered under subsection (c) or (d) of section 7. Written notice of such election shall be submitted to the Director by no later than the date that is 45 days after the date of such appointment.

(2)(A) The petitioner may modify any petition transferred to the Director under paragraph (1) in order to conform the petition with the requirements of section 7.

(B) Any petitioner who elects to have a petition that is transferred to the Director under paragraph (1) considered under section 7(d) may submit additional arguments and evidence with the notice of election submitted under paragraph (1).

(b)(1) Notwithstanding any provision of this Act other than this subsection, during the 2-year period beginning on the date of enactment of this Act—

(A) the running of the periods of time in which actions are required to be taken under—

(i) subsections (b), (c), and (d) of section 8, and

(ii) subsections (b) and (c) of section 9, shall be suspended, and

(B) the provisions of sections 8(i) and 9(g) shall not apply.

(2)(A) During the first year of the 2-year period beginning on the date of enactment of this Act, the Director shall—

(i) make a preliminary ruling under section 8(d) on each petition that is under active consideration, or awaiting active consideration, on the date of enactment of this Act,

(ii) provide petitioners, by no later than the date that is 9 months after the date of enactment of this

Act, written notice under section 8(b) of obvious deficiencies or significant omissions in the evidence submitted with respect to any petition for acknowledgment under section 7(c) that is a pending petition on the date of enactment of this Act but is not described in clause (i), and

(iii) begin active consideration of any petition for acknowledgment under section 7(d) that is submitted to the Director under section 7 or subsection (a).

(B) Any petition described in subparagraph (A)(i) shall be considered under the criteria set forth in section 7(c). Such petitions may not be removed from active consideration on the basis that additional information is necessary to meet such criteria.

(3) During the second year of the 2-year period beginning on the date of enactment of this Act, the Director shall—

(i) make a preliminary ruling under section 8(d) on either—

(I) all petitions described in paragraph (2)(A)(ii) that are under active consideration or awaiting active consideration on the date that is 1 year after the date of enactment of this Act, or

(II) if the number of such petitions exceeds 10, at least 10 of such petitions,

(ii) make a preliminary ruling under section 9(c)(1) with respect to either—

(I) all petitions described in paragraph (2)(A)(iii), or

(II) if the number of petitions described in paragraph (2)(A)(iii) exceeds 10, at least the first 10 of such petitions that were submitted to the Director, and

(iii) begin active consideration of any petitions described in paragraph (2)(A)(ii) for which a preliminary ruling is not made during such year, but only if the petitioner has responded to any notice of obvious deficiencies or significant omissions that the Director has provided to the petitioner.

(4) For purposes of this subsection, the terms "active consideration" and "awaiting active consideration" have the respective meaning given to such terms under the regulations and procedures applied by the Bureau of Indian Affairs of the Department of the Interior on the day before the date of enactment of this Act with respect to petitions for acknowledgment.

(c) If an Indian group was the subject of a final determination denying acknowledgment under the regulations in force prior to the enactment of this Act, or under a judicial decision made before the enactment of this Act, the Indian group may apply directly to the Panel for reconsideration of the determination, based upon the prior administrative or judicial record. The Panel shall then review the application of the Indian group for reconsideration of the determination in accordance with the criteria set forth in this Act.

### AUTHORIZATION OF APPROPRIATIONS

SEC. 15. (a) There are authorized to be appropriated for the Department of the Interior for the purpose of carrying out the provisions of this Act—

(1) $3,000,000 for each of the fiscal years 1990, 1991, and 1992, and

(2) $2,000,000 for each of the fiscal years 1993, 1994, and 1995.

(b) There are authorized to be appropriated for the Administration for Native Americans of the Department of Health and Human Services for the purpose of carrying out the provisions of section 13, $500,000 for each of the fiscal years 1990, 1991, 1992, 1993, 1994, and 1995.

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## STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, VICE CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

Senator McCAIN. Thank you, Mr. Chairman.

I am pleased to be here today to hear testimony on S. 611 which would establish administrative procedures to extend Federal recognition to certain Indian groups. In prior hearings we have heard testimony that the current administrative process for Federal recognition of certain Indian groups is a very costly and protracted one. There needs to be consistency and fairness in the Federal recognition process, which has too often been characterized by inconsistency and a lack of fairness.

There can be no doubt that the Congress holds the full authority to regulate relations between the Federal Government and the tribes. The commerce clause of the Constitution is explicit in this regard and the Federal courts have consistently affirmed this authority. From the earliest times, the Congress has acted to recognize the unique government-to-government relationship with the tribes. I emphasize the word "recognize." The fact of the existence of an Indian tribe is distinct from the fact of recognition. In the matter of recognition we are concerned with the Federal/tribal political relationship. There are, and always have been, some Indian tribes which have not been recognized by the Federal Government. This lack of recognition does not alter the fact of the existence of the tribe, it merely means that there is no formal political relationship between the tribes and the Federal Government.

Over the years, our courts have ruled that recognition, while solely within the authority of the Congress, may also be conferred through actions of the Executive branch. Indeed, both the President and the Secretary of the Interior have historically acted in ways which the courts have found to constitute recognition of Indian tribes. During 1978, the Secretary of the Interior promulgated regulations specifically establishing criteria and procedures for the recognition of Indian tribes.

It should be noted that the Secretary did not act in the absence of substantial pressure. Various Indian tribes, both recognized and unrecognized, as well as the Select Committee on Indian Affairs were very active in urging the Secretary to establish uniform procedures and criteria to be utilized in making recognition decisions. Subsequent congresses have acquiesced in the Secretary's regulations by annually appropriating funds to provide for the review of tribal petitions for recognition. Since 1978, tribal groups have filed 114 petitions for recognition. The Branch of Acknowledgment and Research of the Bureau of Indian Affairs has acted on 19 of these petitions. Of this number 11 petitioners were denied recognition and 8 were granted recognition.

In 1978, 1983, and 1988 the Select Committee on Indian Affairs held oversight hearings on what has come to be known as the "Federal Acknowledgment Process" (FAP). At each of these hearings the record has clearly shown that FAP is not working properly. For petitioners, the process is costly, too lengthy, and sometimes arbitrary. For the Department of the Interior, the process is most often frustrating primarily due to the lack of staff and resources needed to fairly and promptly review all petitions. At the present time, about 10 employees of the BIA's Tribal Government Services Offices are involved in the administration of FAP. The annual cost to the Federal Government is estimated at $450,000.

The record from our previous hearings reveals a clear need for the Congress to provide direction and funding to the BIA for the recognition process. I believe that the bill which I introduced this week will go a long way toward resolving the problems which have plagued both petitioners and the Department over the years.

This bill is not an attempt to rewrite the body of laws that apply to the recognition process. It incorporates the Secretary's existing recognition criteria. By doing so, the bill avoids the need to reevaluate prior decisions of the Department and the need for tribal groups to file new petitions. The bill provides realistic time lines to guide the Department in the review and decision process. Some petitioners have waited 10 or more years for even a cursory review by the BIA. This bill requires the Secretary to complete an initial review within 18 months from the date of the filing of the petition. The overall review and decision process cannot exceed 6 years. Any petition which is still pending after 6 years will become subject to review by the Federal courts.

To ensure fairness, the bill provides for appeals of adverse decisions to the Department's Office of Hearings and Appeals. Final decisions on appeal are subject to further review in the Federal courts. To ensure promptness, the bill authorizes increased funding for the Department. The present annual funding level of $450,000 would be increased to $1.5 million. In addition, all petitions would be processed on a first come, first served basis to avoid arbitrary decisions about the priority for processing applications. To assist petitioners in the preparation and filing of their petitions, the Administration on Native Americans of the Department of Health and Human Services is authorized to provide up to $500,000 per year in grants to unrecognized tribal groups.

This bill will also provide some finality for both the petitioners and the Department. The Department has had a process for recognizing Indian tribes, in one form or another, since the 1930s. Great uncertainty has existed in the Department as well as among tribal groups about when or how this process might be concluded. I believe that it is in the interest of all parties to establish a clear deadline for the completion of the Department's recognition process. Accordingly, the bill requires all interested tribal groups to file their petitions within six years of the date of enactment. The Department is required to complete action on all petitions no later than 12 years after the date of enactment. Of course, it will still be possible for any tribal group seeking recognition to directly petition the Congress.

Mr. Chairman, I would be remiss if I did not take a moment to compliment you on your efforts in this area. It is largely due to your leadership and diligence that the problems involved in the recognition process have come to light. S. 611 is the culmination of those efforts and would do much to correct the deficiencies in the Department's handling of recognition petitions. As always, I appreciate and respect your leadership and initiative.

There are several provisions of S. 611 with which I have difficulty. First, S. 611 appears to authorize the establishment of a substantial new bureaucracy within the Department, including a new office and a new appeals authority. The cost for this is about twice the amount contained in my proposal. In this time of severe spending constraints, I question the need to expend large sums to establish another layer of bureaucracy. Second, S. 611 provides for a system of preferences and automatic recognition in certain circumstances. While I certainly agree that the Department needs firm direction from the Congress, I am not at all certain that it is sound policy to automatically extend recognition to a tribal group simply because the Department misses a statutory deadline for processing petitions. Nor am I convinced that certain petitioning groups should be treated preferentially with respect to other petitioners. Third, I am troubled by provisions of S. 611 which will reopen previously settled claims for recognition. There must be some finality in this process. We should not, at this late date, alter the Department's established criteria and then reopen closed matters for another review. It is this same concern for finality which has led me to include provisions in my bill to ensure that there is a definite time for the completion of the Department's recognition process.

Mr. Chairman, I am confident that we can continue our work in this area from the strong bipartisan spirit of the Select Committee on Indian Affairs. I know you have labored long and hard to preserve and promote that spirit. We are in agreement that legislation is needed to correct the problems which exist in the Department's recognition process. We are also in agreement on key aspects of the solution. I am confident that any differences which are evident in our approaches to this issue can and will be readily resolved in our mutual desire to promote sound Federal Indian policy and provide for the well-being of all Native Americans.

The CHAIRMAN. Thank you, Senator McCain. I would also like to thank you for your nice words and to assure you that I would be most pleased to work together with you on a solution that has been long awaited by all here. Needless to say, there are many roads that lead to this goal of ours.

May I now call upon Senator Reid for any comments he may wish to make?

Senator REID. Thank you very much, Mr. Chairman.

I would first like to acknowledge that this is my first hearing after my being placed on this committee. I look forward to this and many other hearings. I'm happy to be on the committee. I can't speak for any place other than Nevada, but I feel that the Nevada Native Americans for too long have not been given the attention that they deserve. I hope to be able to direct proper attention to those Native Americans from my position on this committee.

I look forward to working with the committee under your leadership which has been so outstanding for so many years. Based, as you know, on the work that we have in the Appropriations Committee—I'm chairman of the legislative branch this year—we have hearings starting at 10 a.m., and I'm sure I'll be the only one there, so I'll have to excuse myself and go there. I also look forward to working with Vice Chairman McCain. He and I served together on a committee in House, the Foreign Affairs Committee, and I admire and respect him, especially recognizing that you never have to guess how he stands on a position. I'm sure his service on this committee will be no different.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

May I now call upon my good friend and welcome him back to this committee, Senator Gorton?

Senator GORTON. Thank you, Mr. Chairman.

You and the Vice Chairman have outlined the positions of the two bills before us very cogently. I look forward to hearing from the witnesses and I don't need to delay the beginning of that any longer.

The CHAIRMAN. Thank you very much.

Our first witness is the Acting Deputy to the Assistant Secretary of Indian Affairs of the Department of the Interior, the Honorable Hazel Elbert. Ms. Elbert will be accompanied by Ms. Lynn Forcia, Chief of the Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research; and Mr. Scott Keep, Assistant Solicitor, Office of the Solicitor, Department of the Interior.

Ms. Elbert, welcome.

## STATEMENT OF HON. HAZEL ELBERT, ACTING DEPUTY TO THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS (OPERATIONS), BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY LYNN FORCIA, CHIEF, BRANCH OF ACKNOWLEDGMENT AND RESEARCH, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR; SCOTT KEEP, ASSISTANT SOLICITOR, OFFICE OF THE SOLICITOR, BRANCH OF TRIBAL GOVERNMENT AND ALASKA DIVISION OF INDIAN AFFAIRS, WASHINGTON, DC

Ms. ELBERT. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I am pleased to present the views of the Department of the Interior on S. 611, the Indian Federal Acknowledgment Administrative Procedures Act of 1989.

We strongly oppose the enactment of S. 611 because, as indicated in this statement it is unnecessary; it weakens the criteria used in acknowledging groups as tribes; and it could lead to the establishment of tribal status for groups that are not tribes. We defer to the Department of Health and Human Services as to the provisions in the bill relating to that Department. We also understand that the Department of Justice may have additional Constitutional concerns.

S. 611 would replace the Branch of Acknowledgment and Research in the Bureau of Indian Affairs by creating a new Office of Federal Acknowledgment in the Department of the Interior to be headed by a Director appointed for a 6-year term by the President by and with the advice and consent of the Senate. The bill would replace the "Procedures For Establishing That An American Indian Group Exists As An Indian Tribe" in 25 CFR Part 83 by establishing a statutory criteria, procedures, burden of proof, and appeal process for determining whether a petitioning group should be acknowledged as an Indian tribe.

Under S. 611, a group may be acknowledged as a tribe if a processing deadline is missed and members of a group may self-certify facts necessary to establish the group's eligibility for acknowledgment as a tribe.

As the Committee knows, the determination that a group is an Indian tribe is very significant for the group, the Federal Government, and others in their area because, until or except as otherwise provided by Act of Congress, only an Indian tribe is (1) entitled to exercise governmental powers, (2) eligible for the special programs and services provided by the Federal Government to Indian tribes and their members, (3) entitled to assert certain tribal claims and rights—such as land claims and hunting and fishing rights, (4) entitled to assert certain immunities, and (5) subject to special Federal laws governing the disposition of property.

Mr. Chairman, S. 611 would establish an administrative process which would drastically alter the way in which petitions for Federal acknowledgment are processed by the Department of the Interior. Determinations would be made under greatly reduced criteria, with reduced standards of proof, and, in some instances, placing the burden on the Federal Government to disprove tribal existence. These new criteria ignore legal precedents which have long been established for the Federal acknowledgment of Indian tribes. In addition, the new criteria would open the door to possible improprieties and acts that are not consistent with the will of Congress, or to the best interests of legitimate tribes. Finally, the bill does not provide other "interested parties" with an adequate opportunity to submit comments or documentation when a group petitions for Federal acknowledgment.

The finding in section 2(2) is misleading in that the Secretary has acknowledged tribes for many years prior to 1978. More importantly, the finding might be interpreted as questioning the Secretary's authority to acknowledge tribes and thereby invite challenges to those tribes acknowledged by the Secretary.

Section 7(c)(1), for example, is a major weakening of the current acknowledgment criterion in 25 CFR 83.7(a). It does not distinguish between historical identification of an Indian entity and identification of individual group members as Indian throughout time. Documentation of the latter may show that certain families or descendants have maintained some level of Indian identification, but it does not prove the existence of a tribal entity with a government-to-government relationship with the United States. It makes no indication of what quantity of documentation is necessary to trigger the all important "conclusive" demonstration.

Similarly, under section 7(c)(3), Congress would effectively remove the requirement to show continual maintenance of tribal relations, which is essential for a political rather than a mere social relationship. Only the existence of a community at some point in time would have to be shown for tribal political authority to be accepted under the definitions in S. 611.

Section 4(13) of S. 611 provides that acknowledgment of a group as a tribe entitles it "to participate in a government-to-government relationship with the United States." However, under section 7(c)(3) and 4(4), page 4, line 9 and page 14, line 16, of the bill, only a "social interaction among tribal members differentiating members from nonmembers" need be shown to qualify as eligible to participate in that government-to-government relationship. We oppose this creation of new tribal governments where no tribal governmental authority exists.

Another example of the weakening of the criteria is the definition in section 4(7) of "historical times" as the later of 1790 or "the earliest period of sustained contact between the Indian tribe and permanent non-Indian settlements." Under the plain meaning of that definition, it appears that a group organized in 1980 need only meet the criteria under section 7(c)(3) as to the period from 1980 to the present, which would grant groups which were in reality only modern day creations with unique tribal status.

Section 7(c)(4)(C) and 7(d)(1)(A)(iii) permit affidavits by elderly members of a petitioning group or by the group's governing body to be proof of ancestry for purposes of meeting requirements for acknowledgment of the group as an Indian tribe. Standard, acceptable, genealogical practices would require confirming data or permit substantive documentary evidence to the contrary to be used to refute such affidavits.

Although we believe that our current process is thorough, fair, and in accord with legal precedents, we are currently considering ways in which to improve the acknowledgment process.

Mr. Chairman, this concludes my statement and we'll be pleased to respond to any questions the committee may have.

The CHAIRMAN. May I begin by asking for the record under what legal authority does the Administration now terminate or recognize a tribe?

Ms. ELBERT. Mr. Chairman, I would like for Scott Keep to respond to that question.

The CHAIRMAN. Mr. Keep.

Mr. KEEP. Good morning, Mr. Chairman.

The Department does not terminate Indian tribes. As to recognizing and acknowledging a continuing existence, there are a number of statutes which impose on the Secretary specific obligations to provide benefits and services to Indian tribes as well as continuing obligations on the Secretary of the Interior to honor and implement the solemn pledges to Indian tribes made in treaties many years ago. In order to do that, he must necessarily identify to whom he owes those obligations and benefits. And that's the basis of his authority.

The CHAIRMAN. We speak about documentation. I am certain all of you are aware of the history of our relationship with Indians. The phrase "Trail of Tears" is a rather common one in Indian country and many tribes ended up in Oklahoma. At that time there were no documents and, if there were documents, I don't suppose these men and women who were forcibly marched off from the southeast to Oklahoma carried their office supplies with them. How do we get this documentation?

Ms. FORCIA. Mr. Chairman, I think a good example of the documentation that we are able to find is in connection with criteria (e), which requires a group document is Indian ancestry. We have not turned a group down on (e). They were not turned down because the documentation did not exist. They were turned down because the documentation proved that they were other than Indian or that they were other than the tribe that they claimed to be. For example, we could trace some people back to England or Scotland rather than saying that the documentation just did not exist.

The **Chairman**. What if there is a treaty in existence but yet the Government does not provide services? Would that constitute termination or just paper recognition? There are tribes that are recognized by treaty without receiving any services because your Agency refuses to provide services.

Mr. **Keep**. Mr. Chairman, if I may address that. I think the problem is that the entities that were recognized and dealt with in those treaties, the question is do they still exist or do their successors still exist in the tribal state or as a tribal entity in the same sense that they did at the time of the treaty. There are a great many treaties that were entered into in the United States where the groups that the treaties were entered into with have changed and evolved and moved away and dispersed. The question before the Department is does the group that is before it still constitute a group entity which can legitimately claim to represent the party that was a party to the treaty.

The **Chairman**. I think the record should show that these Indians did not voluntarily move from place to place and changes in treaties evolved because I think the record will show that we entered into 800 treaties with Indian Nations and tribes, 430 of those were not even considered by the Senate, 370 were ratified, and we proceeded to violate provisions in every one of them. So that is the record on our treaties with the Indians.

What criteria did the Department use prior to 1978 in determining whether to acknowledge or not to acknowledge?

Ms. **Elbert**. Actually, we used the same criteria that Congress was using at the time. It was done administratively and the records that were available to us were what we used. Basically, it follows the same line of criteria as what we presently have.

The **Chairman**. It wasn't different before 1978?

Ms. **Elbert**. No. Scott would like to add something to that.

Mr. **Keep**. Mr. Chairman, in developing the regulations, the Department reviewed the administrative practices and files from the 1930s when the Department was undertaking to implement the Indian Reorganization Act of 1934 as well as numerous legal decisions which determined or attempted to define what constituted a tribe in the context of a particular statute or otherwise. The Indian Depredation Act was the source of a number of those cases. The criteria set out in the regulations were basically a distillation and a summarization of those findings from the administrative record. They are very similar to what is contained in Felix Cohen's original handbook on Indian law, where he describes how that process was done.

The **Chairman**. Does the Congress of the United States have any authority to acknowledge the existence of or recognize a tribe?

Ms. **Elbert**. Does the Congress?

The **Chairman**. Yes.

Ms. **Elbert**. Yes. We do not deny that Congress has the authority to recognize tribes.

The **Chairman**. Is our authority superior to your authority?

Ms. **Elbert**. I would imagine so.

The **Chairman**. In fact, we delegate our authority to you, don't we?

Ms. **Elbert**. Scott has some additional information he'd like to add to that.

Mr. **Keep**. Mr. Chairman, I think that the cases have indicated that the courts defer to the political branches of Government, as in the language of the Supreme Court decisions, which would include both the Congress and the Executive Branch. So it appears to be a shared responsibility in many respects. As some of the cases have indicated, there may be some limits on Congress' authority just as there are limits on the Executive's authority.

The **Chairman**. In your determination, is there any minimum number that is required?

Ms. **Elbert**. Do you mean of individuals?

The **Chairman**. Do you need 10 individuals or 1,000 individuals?

Ms. **Elbert**. No. The criteria does not require that.

The **Chairman**. Three people can apply and constitute a Nation?

Ms. **Elbert**. We've never had a petition from three people, but I imagine they could apply under the criteria.

The **Chairman**. What is the smallest you have had?

Ms. **Elbert**. The Munsee Thames River Delaware group claimed 34 members.

The **Chairman**. Did we approve it?

Ms. **Elbert**. No, we did not.

The **Chairman**. Why?

Ms. **Elbert**. Do you want to know the specific criteria under which they were turned down?

Ms. **Forcia**. I can't give you all of the specific reasons, but this was a group that we could not find Indian ancestry. In fact, we found other than Indian ancestry for those individuals. It was a recent creation. I believe the group was formed in the 1970s and it had no history as a tribal entity.

The **Chairman**. If a petitioner met all the requirements and criteria in 1901 and again in 1941, could we assume that the criteria was met in the interim period?

Ms. **Elbert**. Mr. Chairman, we don't assume anything. The criteria requires that documentation be provided to us and we feel that documentation is there to show the existence of that group through those periods of time. So we don't assume anything.

The **Chairman**. I noticed that the burden is upon the petitioner. Do we provide any assistance to the petitioner?

Ms. **Elbert**. Yes, sir.

The **Chairman**. What sort of assistance?

Ms. **Elbert**. When a tribe gives us a letter of intent to file a petition, we provide the tribe with the regulations and with guidelines on how to prepare that petition. We also do what we call an obvious deficiencies letter that critiques their petition once it is submitted to us and provide whatever technical assistance that we're able to provide with regard to the petition.

Ms. **Forcia**. Sir, we also work with the petitioner as we're working on the case and if we have additional questions before a proposed finding, for example, is published, we present those to the group and ask for clarification throughout the process. That is one of the reasons why we have asked the groups to keep a professional researcher on their staff to work with us throughout the process.

The **Chairman**. And you are satisfied that the present process that you are following is a fair and equitable one?

Ms. **Elbert**. We're satisfied that it is fair and equitable. We do have some plans to perhaps expand on our guidelines. It might be a little more helpful if we could expand on the guidelines.

The **Chairman**. And you are telling us that those who you have rejected are not Indians?

Ms. **Elbert**. According to our findings. We don't determine whether they are or are not Indian. Our process is to determine if they are an Indian tribe.

The **Chairman**. Tell us what one would have to do to be considered an Indian tribe.

Ms. **Elbert**. If they meet the seven criteria, Mr. Chairman——

The **Chairman**. Please list them now for us.

Ms. **Forcia**. I'd like to just summarize those unless you'd like all of the criteria read. There are seven criteria contained in the regulations. The first one is listed under 25 CFR Part 83.7(a). Basically, it is the requirement that the group provide us a statement of fact establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis as American Indian or aboriginal.

The **Chairman**. From historical times. What is historical times?

Ms. **Forcia**. The definition of historical means dating back to the earliest documented contact between the aboriginal tribe and the United States Government.

The **Chairman**. What is the earliest date?

Ms. **Forcia**. It will vary tremendously depending upon which group you are referring to, sir. Groups in the East will naturally have a much earlier contact with non-Indian, U.S. Government than will groups in California, for example. One case we looked at was the Death Valley Timbi-sha Shoshone. Although there were a lot of settlements around the area, there wasn't a lot of contact in earlier times in the valley for obvious reasons.

The **Chairman**. When the Europeans arrived here the Indians did not have a written language, so who's document do we look at for "documented" contact?

Ms. **Forcia**. I believe that criteria, if I have read it in full, does provide that a petitioner shall not fail to satisfy any criteria because of fluctuation of tribal activities. We do take into consideration the amount of documentation that could reasonably be expected to be available for certain periods of time. We normally do not find as much documentation in earlier periods as more recent. We become more concerned when we're talking about the 20th century and we're still not finding any records that a group exists.

The **Chairman**. But you do not consider recognition by treaty as a criteria?

Ms. **Forcia**. We do not see that a treaty equals recognition.

The **Chairman**. Even if the treaty is an official document of the Government of the United States?

Ms. **Forcia**. We treat a treaty the same as we would any other executive order, proclamation for creation of a reservation, etc. A lot of groups throughout the United States have had treaties but that does not mean that they have continued to exist since that time as a tribal entity.

The CHAIRMAN. Criteria number two?

Ms. FORCIA. The second criteria can be found in 25 CFR 83.7(b), and that is evidence that a substantial portion of a petitioning group inhabits a specific area or lives in a community viewed as American Indian and that there is some distinction from surrounding populations. That, again, is a brief summary.

The CHAIRMAN. Do they have to be on a reservation?

Ms. FORCIA. No, sir; they do not.

The CHAIRMAN. What do you mean by occupying a substantial area?

Ms. FORCIA. The term is inhabiting a specific area. What we mean by that is that members have to live in close enough proximity to each other to communicate with one another so that they are functioning as a tribal entity. That if there is a tribal governing body, it is able to provide some influence over those members. It would be pretty hard for a tribal governing body, for example, to exercise political influence over its members if its main land area was in Rhode Island and most of the members lived in Florida. That is why we use "specific area" as part of the definition.

The CHAIRMAN. In other words, theoretically, if a group of Indians decided to buy one of our little islands in Hawaii and live there, they could qualify under the second criteria?

Ms. FORCIA. We haven't had a situation like that. I'm not sure. We'd have to look at it very carefully.

The CHAIRMAN. Very few of the Indians live on ancestral lands.

Ms. FORCIA. We don't require that they live on the ancestral lands, sir.

The CHAIRMAN. So that means that they can live anywhere.

Mr. KEEP. Senator, if I may. I think the criteria is intended to address the probability of the social cohesion and sense of community that is necessary to constitute a tribe. The example that you cited of a group of Native Americans moving to Hawaii on an island is interesting and I don't know that we have an easy answer to that. But this criteria is designed to address the question of is there likely to be a sufficient social cohesion and community interaction to be typical of the traits of an Indian tribe.

The CHAIRMAN. Why do they have to all live in one locality? As you say, if they live in Rhode Island and Florida, that cannot be cohesive?

Mr. KEEP. Well, I'm not sure that question can be answered all that easily. The test that this is getting at is the evidence of social cohesion. Perhaps a group of Indians which has migrated a significant distance from their aboriginal land may indeed still constitute a tribe. As you pointed out, many of the tribes today do live a substantial distance from their aboriginal tribal territory. But this criteria is intended to address and to quantify, if you will, by objective standards the probability of social cohesion and interaction in the community.

The CHAIRMAN. What is the third?

Ms. FORCIA. The third one can be found in 25 CFR 83.7(c), a statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

The **CHAIRMAN**. There must be an organization. By that do you mean that there must be a formal organization?

Ms. **FORCIA**. We do not require a formal organization. We take into consideration the traditional cultures and the traditional types of organizations of Indian groups. I think that is evidenced by some of the findings that we have published in favor of groups.

The **CHAIRMAN**. What is the fourth?

Ms. **FORCIA**. The fourth is simply that the group must provide a copy of their governing document if there is one. If there is not a formal governing document, at least a statement describing the membership criteria and how the group governs its affairs.

The **CHAIRMAN**. What is the minimum that you would expect?

Ms. **FORCIA**. I don't understand the question, sir.

The **CHAIRMAN**. Anyone who knows Indian tribal organizations will tell you that they all differ. There are some very complex, organized with several layers of bureaucracy; and others, like in California, where they are family clans.

Ms. **ELBERT**. The group should be able to describe that process in a statement. We ask for a statement describing that process.

The **CHAIRMAN**. And what would you require for a minimum?

Ms. **ELBERT**. The statement.

The **CHAIRMAN**. Just the statement?

Ms. **ELBERT**. The statement. If they don't have a formal document, then a statement describing the process that they use to govern themselves is sufficient.

The **CHAIRMAN**. And if the statement said that this family has existed for hundreds of years and that the eldest son assumes the position of leader, would that suffice?

Ms. **ELBERT**. If they could describe how the son—if you're talking about just a family or a tribal group, that's different. You're not talking about——

The **CHAIRMAN**. Well, in California they are all small clans. They are not great Nations like the Cherokees or the Chippewas or the Cheyenne. They are little families.

Ms. **ELBERT**. If the statement can describe how that individual family member was chosen for that position and what his authority is and how they operate traditionally, that would be the kind of statement we would need.

The **CHAIRMAN**. And that you would accept as fulfilling the requirement?

Ms. **ELBERT**. We would probably ask some questions about it if it was not stated clearly enough.

Ms. **FORCIA**. We would also during the course of our research attempt to verify to see if their statement is accurate. If they say that there is an elder son that is the individual who is informally providing political influence over all of the members of the group, we would attempt to verify that.

The **CHAIRMAN**. What is the next criteria?

Ms. **FORCIA**. A list of all known current members of the group and we also request any former list of members if those are available, and who have established evidence that they descend from an Indian tribe.

Ms. **Elbert**. This is where the group provides us a roll of its current members.

The **Chairman**. And you have to prove that each member can trace his or her ancestry?

Ms. **Forcia**. No, sir; we do not require that. That would be too burdensome. It would be unrealistic to expect that and petitioners do not have the kinds of funds to provide that kind of information.

The **Chairman**. So all they have to do is submit a list?

Ms. **Forcia**. They submit a list and we verify what has been submitted. The way we have been verifying that information is by doing random checks of individuals ancestry.

The **Chairman**. What is the next criteria?

Ms. **Forcia**. The next criteria is in 25 CFR 83.7(f). That requirement is that members of a petitioning group be composed principally of persons who are not members of any other North American Indian tribe. We are not attempting to break up existing tribes by the current acknowledgment process and that is, at least in part, the intention of this criteria.

The **Chairman**. I am certainly aware that by policy of the United States Indian tribes were divided, removed. We had our own diaspora. So you will find Apaches in the Southwest, Apaches in Oklahoma, Seminoles in Florida, Seminoles in Oklahoma. Do we recognize just one tribe or do we recognize several Seminole tribes if they are located in several places?

Ms. **Forcia**. Our list of current federally-recognized tribes illustrates that, I believe. There are several Seminole tribes that are recognized. There are several Creek groups, etc. What we mean by this is that these individuals are not on current rolls of tribes. We are not talking about historically.

The **Chairman**. The next criteria?

Ms. **Forcia**. The last criteria is found in 25 CFR 83.7(g). The petitioner is not, nor are its members the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship. We cannot administratively undo something that the Congress has done.

The **Chairman**. Now we have listed seven of them. Does S. 611 include all of these?

Ms. **Forcia**. We do not believe the criteria are the same in S. 611.

The **Chairman**. Which one did the drafters fail to include in S. 611?

Ms. **Forcia**. It is not a matter of not including but the definitions that are used are different, the criteria themselves are stated differently, and——

The **Chairman**. Just give us one example of where we have failed you.

Ms. **Forcia**. A good example, I believe, is criteria E, which provides that Indian groups must submit a list of their members with evidence acceptable to the Secretary that they are actually of Indian ancestry. The bill, S. 611, would merely require that groups have an individual tribal elder state that they are Indian. We do not feel that is sufficient.

The **Chairman**. How do you test whether one is of Indian ancestry?

Ms. FORCIA. Using standard genealogical practices, we have made our determinations on all of the 19 cases that we have processed thus far.

The CHAIRMAN. You must have a birth certificate?

Ms. FORCIA. No. As I stated earlier, we do not request documentation from every individual. We do spot checks. Our genealogists make a determination as to what family groups all members of the group descend from. In some cases, they may only trace back to three historical families. In other cases, they may trace back to several families, maybe 20 or 30 families. What we do is we might pick one individual from four or five of those families and seek documentation to verify whether they have Indian ancestry. In the cases thus far that we have turned down, it is not a matter of us not being able to locate documents or find documents that will verify the petitioners statements, it is the documentation we have found proves something other than Indian ancestry.

The CHAIRMAN. Thank you very much.

Senator McCain?

Senator McCAIN. Thank you, Mr. Chairman.

Ms. Elbert, how many unrecognized Indian groups are there in the United States? What's your best estimate?

Ms. ELBERT. Unrecognized groups?

Senator McCAIN. Unrecognized, yes. Do you have any estimate?

Ms. ELBERT. We estimate that there are about 198.

Senator McCAIN. And how many petitions for Federal recognition does the BAR receive each year?

Ms. ELBERT. When we talk about petitions, Senator, we speak in terms of documented petitions. There is a difference between receiving a letter of an intent to petition and receiving a documented petition.

Senator McCAIN. Roughly how many documented petitions?

Ms. ELBERT. We have received 31 documented petitions.

Senator McCAIN. In 1988?

Ms. ELBERT. Oh, not in 1988. Since 1978 when we first started the process.

Senator McCAIN. That's roughly 10 years.

Ms. ELBERT. Let me give you an overall picture of what we've received. We have received, since 1978, 114 letters of intent to petition. Of those 114 letters of intent to petition, we have processed 21 percent of those, we have acknowledged 7 of them through the CFR procedure, 12 of those have been denied through our procedure, and 5 of them have been resolved outside of the acknowledgment process.

Senator McCAIN. Has the number of petitions received increased or decreased in recent years?

Ms. ELBERT. We have the 114 and they have not increased or decreased, the status of them has changed.

Senator McCAIN. Well, you didn't receive all 114 in 1978.

Ms. ELBERT. No, and we don't have them broken down by year. The dates are very mixed depending upon the category in which they now rest.

Senator McCAIN. How do you ensure that your decisions apply uniform standards of review for all petitioners? One of the complaints is that there are not uniform standards of review. How do you ensure that there are uniform standards of review?

Ms. Elbert. The criteria in 25 CFR Part 83 is applied to all of the petitions. We don't change the criteria from tribe to tribe.

Senator McCain. Has the Administration done a cost estimate of implementing S. 611?

Ms. Elbert. No, we have not.

Senator McCain. Does the Administration have some cost estimates for the funds which would be required for newly recognized Indian groups under S. 611?

Ms. Elbert. No.

Senator McCain. We'd appreciate it if you'd look into that and provide those answers for the record.

Ms. Elbert. We will attempt to do that, sir.

[Information to be provided follows:]

Under S. 611, we believe that all of the current petitioners could be recognized. The estimated membership of all groups who have petitioned is $136,288. Using the figure of $2,066 per year to provide Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) services to the membership of each of these groups, the estimated cost to implement S. 611 would be $281,571,008 per year.

Senator McCain. Do you have an estimate of how many tribal groups would be created and funded under S. 611?

Ms. Elbert. Under S. 611, we estimate that all of them would receive acknowledgment.

Senator McCain. All 114 of them?

Ms. Elbert. All 114 of them.

Senator McCain. All of them would be eligible for Federal recognition?

Ms. Elbert. That's right.

Senator McCain. Thank you very much, Mr. Chairman.

The Chairman. Will you yield to that? How did you reach that conclusion that under S. 611 it would be blanket recognition of all?

Ms. Elbert. As we mentioned in our testimony and the analysis of the criteria of S. 611, we pointed out the weakness that we saw in several of the criteria. Based on those weaknesses, we felt that all 114 of them would meet the criteria.

The Chairman. So you think that this bill will just rubber stamp everyone?

Ms. Elbert. I don't know if that's the term that I would put on it, but we do feel that they would all meet the criteria.

The Chairman. Senator Gorton.

Senator Gorton. I have no questions.

The Chairman. I thank you very much, Ms. Elbert.

Our next witness is Mr. Reid Chambers.

## STATEMENT OF REID CHAMBERS, ESQ., SONOSKY, CHAMBERS, SACHSE & MILLER, WASHINGTON, DC

Mr. Chambers. Thank you, Mr. Chairman and members of the Committee.

My name is Reid Chambers and I am a lawyer in private practice in Washington, DC. I'll summarize my statement and submit the full statement for the record.

Mr. Chambers. Our law firm represents Indian tribes and tribal organizations. Some of our clients either have sought recognition or are seeking it now under the acknowledgment process. But I'm not appearing here to testify on behalf of any of them. I'm appearing at the invitation of the Chairman and the Committee to discuss my experiences in teaching and practicing Indian law in public and private life for nearly 20 years.

Let me first discuss what recognition or acknowledgment is all about. It establishes what tribes are eligible for a political relationship with the United States Government. One result of recognition or acknowledgment, of course, is that Federal programs become available to the tribe and its members because of their status as members of a federally recognized Indian tribe. That's obviously important, and tribes obviously seek recognition partly to achieve that.

But I think it is very important to keep in mind that that's not the purpose for acknowledging an Indian tribe or recognizing an Indian tribe under the law. The purpose of recognition is because the tribe is entitled to protection by the Federal Government of its governmental status and its culture. The basic purpose of the Federal trust relationship that extends to those tribes, as I see it, is to allow tribes to flourish as separate and distinct cultures with separate and distinct political institutions.

In that respect, Indians are different from other racial or cultural minorities in our country. There is no doubt that Indians are a racial and cultural minority and there is no doubt that they are usually socially and economically disadvantaged. But that's not the underlying reason for recognition or acknowledgment or maintenance of a political trust relationship. So this isn't simply a matter of making economic resources available. That should be done, it should be done generously where it's needed, but that's not the underlying purpose of recognition.

Second, maybe I can shed some light on how this controversy about recognition developed, because I think it did develop when I was Associate Solicitor at the Interior Department. My recollection of its history is somewhat different from the Government witnesses, although I haven't had a chance to check all my files on it. The question came up in the treaty fishing rights case in your State, Senator Gorton, when you were Attorney General. What happened is a number of tribes that had treaties in the State moved to intervene in this case, which the Federal Government and a number of other tribes had brought to protect treaty fishing rights. These intervenor tribes, the Stillaquamish and others, said, "look, we have treaties with the United States and these give us treaty fishing rights." The United States Justice Department and the Interior Department at that time opposed the intervention on the ground that these tribes were not currently administratively recognized by the Interior Department. I must say there was a lot of controversy within the Department about that and I was on the losing side within the Department, but that was the Department's position.

Now about the same time, the Maine Indian tribes were pursuing land claims in the State of Maine on the ground that they were Indian tribes under the Federal Trade and Intercourse Acts that protected Indian tribes' property. The United States was sued because it wasn't supporting that position in litigation, and the tribes sought what's called a writ of mandamus to direct the United States to get on their side. The United States defended saying, "you were Indian tribes in 1790 when the first Trade and Intercourse Act was passed but you're not a recognized Indian tribe now, because you are not administratively perceived as a tribe." That controversy led to a whole series of impasses within the Department of the Interior. The courts resolved it in favor of the tribes. I cite the court cases in my prepared statement. Basically the courts said that once Congress has congressionally recognized a tribe, either in the Trade and Intercourse Act, or in a treaty, the Executive Branch doesn't have power to retract that recognition or to terminate those rights. That's the law as it came down in those cases and I felt good about them because I felt the case vindicated the position that I was taking internally in the Interior Department. That was my view of the law then, and it's my view of the law now.

There are about four or five issues that I think are critical in your bill, Mr. Chairman. I had the chance, Senator McCain, to read your bill last night, after I prepared my statement. I think that both bills are very important because I think they do address something that everybody agrees or ought to agree that Congress needs to take charge of here. I think there are about four or five issues that I'd like to speak to. I'll give you the best advice I can—but I think this is an area you need carefully to reflect on some of these questions, and I'm a little more tentative on some of these issues than I usually am when I come up here and make recommendations.

On thing that is very clear, Mr. Chairman, and it was emphasized in your earlier questions—this issue of tribes having treaty rights. That once a tribe has a treaty right or once Congress has determined that a tribe is entitled to Federal protection of its government and its culture, that ought to end the matter. I never thought that it was the province of the Regional Solicitor in Portland or somebody other executive official to say, "hey, look, this isn't a tribe I currently perceive or recognize." So I take strong issue with the position of the Department that they have the authority to deny recognition to a tribe that has a treaty. One can imagine facts where the tribe may have clearly and voluntarily and unquestionably stopped existing. But I think that's a very heavy burden of proof on the Department, not on the tribe. And once Congress has ratified a treaty with the Stillaquamish tribe or some other tribe and people come in and show they are the descendants of the people who signed that treaty and are a tribe today and hold meetings and the like, I think that's enough. There's nothing more solemn than a treaty in Indian affairs. So I support the concept, Mr. Chairman, in your bill. I wouldn't call it a fast track. I would say that Congress has the ultimate authority in this matter, and when Congress has acted, Executive officials are required to carry out its mandate. Just while we were sitting waiting for the hearing this morning, one tribe was talking to me about spending $300,000 to put petitions together, where it is a treaty tribe. That's a waste of everybody's money and everybody's time when Congress has already ratified a treaty with that tribe.

As a second issue, there was some question back in the early 1970s as to whether the Interior Department had authority administratively to set up a process and to recognize tribes, or whether Congress had to do it. I think that the Department is right, and I think both of your bills correctly confirm that the Interior Department does have that authority. Now, of course, if you wanted to, under your Constitutional plenary power, Congress could list all tribes that are recognized. There are a few instances where you've passed legislation saying a particular tribe is recognized. But usually you've just passed legislation saying that "Indian tribes" are entitled to certain programs, or entitled to certain contracts, and grants, and left it to the administrative branch of the Government to decide what is an "Indian tribe" under that statute. So I think that while there are limits on the Secretary's power—and I don't think the Secretary's regulations have entirely been faithful to those limits, I think they have exceeded them—I think that the Secretary has the authority that he's exercised since 1978 to recognize tribes. I think it is time, now, given some of the things that have happened in the Department, for you to exercise more control over that process, as you're doing in both bills. But I do think that the Secretary has that authority.

My third point is that—while I think that a strong record has been made and, again, I think both bills agree on this that the process has been too cumbersome, that there has been too much delay, I am concerned, Mr. Chairman, with some of the time deadlines in S. 611, and with the remedy simply being that if those time deadlines are missed by short periods of time, a tribe simply gets automatically recognized. I think that's something that you need to reconsider. I think that may be a solution that's worse than the problem. This is not a determination that can be easily made or lightly made. Some time deadlines need to be set and the Committee will, I'm sure, by oversight make sure that its deadlines are observed or substantially observed, but I am concerned with some of the deadlines in the bill as I read them.

The fourth thing I wanted to talk about, and I'll probably refer to my statement on this, is that there is another group of tribes that present a harder question than treaty tribes. Those are tribes that don't have treaties or a history of prior recognition. You deal with that in your bill, Mr. Chairman, in section 7(c). A number of these tribes were well within the boundaries of the settled colonies, so that you have tribes out on Long Island or Martha's Vineyard or along the Eastern seaboard and the Carolinas where the frontier had passed them by the time of Independence and there just weren't any treaties with them. But these tribes have continued to exist. Usually the states have a relationship with them, and usually, for reasons that I think are historical accidents, the United States doesn't. So there is a strong claim that those groups, in fairness and equity, ought to be treated the same as the western tribes that just for historical reasons tended to be west of where the frontier was in the 1780s.

There are some other groups—you referred to them, Mr. Chairman—where a large group of the tribe was forcibly removed, as in the Trail of Tears out to Oklahoma or somewhere else, but where some of the members of that larger tribe successfully hide out in the hills. They should be entitled to recognition and acknowledgement.

Then there are some tribes, like in the State of California, where they were just virtually hunted down. There is a terrible record on that. I think there is a strong compelling reason of equity to consider them.

I have always had trouble with one of the criteria that is in the current regulations; that is the requirement that a tribe continuously assert political authority and social cohesion. I thought when I was in the Department that was an unrealistic criterion and I urged against it. Ultimately the regulations that were adopted after I left included that.

I think given the history of outright discrimination against Indian tribes, given the forcible repression of Indian culture that went on for long periods of our history, it is perfectly understandable that a lot of tribes would have simply have gone underground basically and wouldn't have documents and wouldn't have openly functioned as an Indian tribe. So I think that criterion needs to be given careful reconsideration.

What I'm honestly very unsure about is the provision in your bill in section 4.5 that sets up a presumption that if there is not more than a 50-year gap between two exercises of political authority, that should satisfy the continuity requirement. I'm really unsure about that. I hadn't focused on that until I read your bill in the last couple of days, and I honestly don't know whether I support that or whether there should be some other standard. I do think the current standards in the regulations do deny reality, and I think that some new standard in this area needs to be worked out. I think it needs to balance two things: (1) the fairness and the equity to the groups that have been left behind for basically historical and fairly arbitrary reasons, with (2) the concept that the United States provides Federal protection for groups that have a culture, that have a government, and that can flourish. I think that societies can change over time. They are changing in Eastern Europe now, as in the Soviet Union, where nationalities that were repressed during Stalinist times or other times are now reasserting a nationality. That's perfectly common in the world. Political communities evolve, so the bill needs to have some latitude and some generosity in this. But I don't think you want to be creating tribes where there isn't this culture, where there isn't this potential for separate government. I think you need to think about this issue. Certainly I would want to think about it before I'd know exactly how to do it.

The last point I want to make concerns funding. You've been commendably vigilant on this on water projects for Indian tribes where Congress has at long last really moved and moved very effectively to fund them in Arizona, Colorado, and in other states. There is no justification for that funding subtracting from existing tribal governments. If there are going to be an expansion of recognized tribal governments, and I think there should be, it should not come off the hide of existing recognized tribes. Existing tribes are really strapped right now by Federal cutbacks. Some of my clients have suffered cutbacks in the range of 50 percent of what their funding was 3 or 4 years ago in real terms. So this needs to be done in a way that doesn't disrupt the existing federally recognized tribal governments, but yet provides equity and fairness for the groups that should be included.

Mr. Chairman, and members of the Committee, that concludes my statement. I'm honored and appreciate your inviting me here today. I'd be happy to answer any questions you may have.

[Prepared statement of Mr. Chambers appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Chambers.

You spoke of automatic recognition if a treaty exists. In California, by treaty, we set aside four reservations in which we gathered culturally unrelated, politically unrelated, and socially unrelated tribes. Many tribes were small but there were one or two dominant tribes there and the treaty was signed with the leaders of the dominant tribes. Now these lesser tribes are seeking recognition. Can they use this treaty as a basis for their recognition? For example, in the Hoopa Valley there are several smaller tribes that have different languages, different culture, different social structure, different dress, and even to the uninitiated they look different. But history shows that they were forced to live in this one area because instead of having 150 reservations, we decided to have four.

Mr. CHAMBERS. I know the Hoopa-Yurok situation generally, but I'm not very familiar with that. The Yuroks were not signatories to the treaty, as I recall. There were unratified treaties in California but I believe they weren't signatories to any ratified treaty. Unless I'm wrong on that. Then I think they would have to go through the recognition process as a nontreaty tribe. What I was thinking of with the treaty situation is that once Congress has concluded a treaty, that's it. It is just simply Executive overreaching for the Executive to decide that it is not going to perceive this tribe anymore. I think that is Executive termination and I think it's unlawful.

The CHAIRMAN. Do the treaties have to be ratified?

Mr. CHAMBERS. To have lawful effect under Federal Indian law they do, Senator. California is where I started working in Indian affairs. Your staff director was one of my students, actually. We were both out at UCLA law school then, longer ago probably than either of us care to admit. That was a terrible situation in California. Congress didn't just not ratify the treaties. They hid them. They were hidden and didn't come to light for about 50 or 60 years afterwards, because the Government wanted to keep it a secret that they'd signed those treaties.

So I think this creates strong and compelling equities for California Indian groups that have shown great courage and tenacity in surviving to this day. But I don't think as a legal matter that you want to get into ratifying ancient unratified treaties. Of course, Congress has the Constitutional power to do it. I don't understand any Constitutional objections that could be raised against your power to do that, but I think it would be preferable to confine the treaty situation to ratified treaties.

The CHAIRMAN. My final question is on the deadline. What mechanism would you suggest in lieu of the deadline? As we have at the present time, the process is being dragged out indefinitely.

Mr. CHAMBERS. There's no justification for the kinds of delays and the paper work that the groups have been put to. I think you do have to have deadlines. With all respect, Mr. Chairman, I had a feeling that some of the deadlines in your bill simply were unmeetable. I think Congress did the right thing—being a private attorney, maybe this isn't the right example to give—back in 1968 there were similar delays in approving private attorney contracts. Tribes needed legal representation, they couldn't wait, they had emergencies, they needed to bring law suits. So Congress passed a statute in 1968 that if the Secretary didn't act within 90 days, then an attorney contract was considered approved. The Secretary's review in that area is more ministerial, or it has developed as being more ministerial. They check to see whether the attorney is a member of a bar, and hasn't been disbarred and is charging a rate that is not excessive, and that kind of thing.

But in this recognition area, Mr. Chairman, I think this is an awfully important determination. It is kind of a bedrock essential determination of where the political trust relationship extends. I think it does take more time. I can't say that a particular deadline seemed 30 days too short, or something like that, but it seemed to me that this is something that is going to take a few years to sort out. It's not something that can be done in 180 days, or in a time frame like that.

I don't think it is something as a matter of policy that the Congress should say that if the Government misses a deadline, but the review is substantially completed, that you then want to recognize a group that maybe shouldn't be recognized. It is very important, however, that you come up with a bill and that you get one passed. I think that everybody feels that this has just dragged on too long.

The **Chairman**. Thank you, Mr. Chambers.

Senator McCain.

Senator **McCain**. Thank you, Mr. Chairman.

Mr. Chambers, I appreciate your testimony and your years of work on behalf of Native Americans.

One of the people who I've grown to admire over the years, is Felix Cohen——

Mr. **Chambers**. Oh, yes, he's the Shakespeare of our field, Mr. Vice Chairman. All of us who come after him can't get anywhere near him.

Senator **McCain**. Let me give you a quote from him and ask you if you agree or disagree with it. In passing on the status of the Miami and Peoria Indians case some years ago he said, "It is not enough that the ethnographic history of the two groups shows them in the past to have been distinct and well-recognized tribes or bands. A particular tribe or band may well pass out of existence as such in the course of time. The word "recognized," as used in the Oklahoma Indian Welfare Act, involves more than past existence as a tribe and its historical recognition as such. There must be a currently existing group distinct and functioning as a group in certain respects and recognition of such activity must have been shown by specific actions of the Indian Office, the Department, or by Congress." Do you agree with that?

Mr. **Chambers**. I generally agree with it. I don't know the detailed facts, Senator, on the groups he's speaking of. It's one of those groups in Northeastern Oklahoma.

I agree that in order to be recognized you need to have an effective, functioning government and culture today. I agree that you need to have had it in treaty times. I agree that there needs to be some continuity on that. But I think some cases—and I'm particularly thinking of the *Mashpee* case—have required that it be shown decade by decade, that kind of thing. You have the lawful power to overrule that kind of case and I think you should.

I think that political societies have ebbs and flows in them and given the history of Indian tribes in the country, it seems to me very understandable that in long periods of time where there was strong assimilation pressures, tribes didn't function openly. I'm representing a new client, the Chitimacha Tribe in Louisiana, for example. They showed me a newspaper article that I just couldn't believe. Around the turn of the century on Christmas day some white citizens of the town just went out and shot up some people for being Indians and got away with it. That's incredibly sad. It wasn't even a frontier area or something like that. But the kind of pressures that those people were under during those decades and in those times, were incredible. For them to be around today and to be preserving their culture and functioning is just a marvelous testament to the courage of those people. Some of the same family names are there, this is a recognized tribe so there's no question of recognition, but they've survived with that kind of pressure, with that kind of tension. I can really understand why they probably didn't hold tribal council meetings for a couple of decades in a formal sense. But if you go out there today on that Bayou they are functioning as a culture and as a society, and they ought to be recognized, and are. That's my thinking on it, but I agree generally with what Felix Cohen is saying.

Senator McCAIN. We've always had groups of Indians or people of some Indian descent, which were not recognized because these groups have not existed as separate, distinct, sovereign entities. Should we change Federal policy and recognize such groups?

Mr. CHAMBERS. I think so, if I understand your question. I think Federal policy is too restrictive in the administrative regulations within the Interior Department. I don't think they're a lot too restrictive. I think I agree with something like five of the seven present criteria. I think it needs to be loosened a little bit. I don't know the facts of the 114 petitions, but I would be surprised if all of those ought to be granted.

Senator McCAIN. We're going to hear from other witnesses from federally recognized tribes that they believe that this policy change would have the effect of diminishing tribal sovereign powers.

Mr. CHAMBERS. Absolutely, and I think reasonable minds can reasonably differ on this. I think that the two bills ought to be harmonized and that they are both useful suggestions for promising reform.

Senator McCAIN. I read your statement with interest and I think it's an excellent statement. If 50 years is not the correct period of time for determining continuous existence, what is? Should it be 10 years, 200 years, or do you have any ball park figure? In other words, you raise an objection to 50 years and I wonder what your recommendation is as to what would be reasonable.

Mr. CHAMBERS. I don't know and I apologize for that. Those of you who know me know that I don't usually come up here and be equivocal. I want to think about it. I think it needs to be worked out and something needs to be done. I think this is becoming the kind of the mess that the Indian Claims Commission became where it just goes on and on and on. It is something that you're rightly getting into now and I do think you need to do something. Maybe it's not a number of years. It may not be an issue of picking a precise number of years. It may be more of an equitable assessment, Senator, I'm not sure.

Senator McCAIN. It is refreshing, frankly, to hear somebody say "I'm not sure."

Mr. CHAMBERS. Well, when you don't know you have to say so, Senator. You just don't want to do it too often.

Senator McCAIN. In regard to treaty tribes, you recommend a preference or an expedited process. Would you apply that preference to groups with unratified treaties?

Mr. CHAMBERS. No; I would not. Incidentally I don't see it as a preference, or an expedited process, for treaty tribes, so much as simply a declaration that you've decided this. Congress are the ones that have plenary power, the Executive does not. Your predecessors decided that question when they ratified those treaties. So I think those could just be disposed of.

Senator McCAIN. Do you have any idea how many tribes with ratified treaties are currently not federally recognized?

Mr. CHAMBERS. No, I have no idea, Senator. That would be real findable. As Senator Inouye said, I think there are 371 ratified treaties and——

Senator McCAIN. Would you suspect that there is just a handful of tribes or would you suspect that there are a lot of tribes out there with ratified treaties that we have not recognized?

Mr. CHAMBERS. I would guess we would be talking about somewhere around 40 or 50. That's really just a guess, I could be off by a factor of two.

Senator McCAIN. I understand. Thank you for your testimony, Mr. Chambers.

Mr. CHAMBERS. Thank you very much, Senator.

The CHAIRMAN. May I just ask a question on sovereignty. Do you consider Indian tribes to be sovereign?

Mr. CHAMBERS. I certainly do.

The CHAIRMAN. As a sovereign, can that political unit determine citizenship?

Mr. CHAMBERS. Yes; absolutely. It has absolute power to do that. It can't decide, I guess, that a non-Indian could be a citizen, or at least that non-Indian wouldn't be a person encompassed within Federal services. But tribes have the authority, and cases are very clear on this, to determine their members, and the courts have indicated this. We had just such a case for the Narragansetts a couple of years ago.

The CHAIRMAN. So if the tribal organization decides that notwithstanding the fact that this Indian came from another tribe, he or she will from this day forward be a member of this tribe?

Mr. CHAMBERS. You're thinking of a dual citizenship situation?

The CHAIRMAN. No; let's say that this member from the Apaches has been living with the Cherokees now for 50 years, can the Cherokee tribal council decided that this Apache man can be a member of the Cherokees?

Mr. **Chambers**. If he's not a member of the Apaches now, I believe so. This is an interesting question, because of the case down in your state, Mr. Vice Chairman, that's going to the Supreme Court. I have taken the position, and this may be something reasonable people will differ with me on, that a tribe can have a separate class of membership. As a matter of policy, it is legally up to the tribe to decide that. You have a situation on every major Indian reservation where about 15 percent of the Indian people on the reservation are members of other tribes. You have that at Salt River, where you have Pimas from Gila River or Papagos who have married into the tribe and had children. Now, the children may be enrolled in a different reservation, but they live and have grown up on the reservation. I see no reason legally why a tribe could not establish an associate membership category or why they couldn't admit those people to membership.

The **Chairman**. If that is done, will the Federal Government be forced to recognize them as a member of the tribe?

Mr. **Chambers**. That's for Congress to decide. Congress could pass a statute as part of your plenary power that says you have to have one-quarter blood, or something like that. You haven't usually done that. You've tended to follow the tribal determinations, and I think you should. But certainly tribes can set their own blood quantum—some tribes have very low blood quantums, some tribes have very high blood quantums. I think that's a matter for tribal sovereignty and I think Congress ought to follow the tribal determination. But it is ultimately a matter for your determination.

The **Chairman**. I thank you very much, Mr. Chambers. You have been extremely helpful.

Mr. **Chambers**. Thank you, Mr. **Chairman**.

The **Chairman**. We now have a panel made up of tribal leaders: The Honorable Darrell Wadena, Chairman of the Minnesota Chippewa Tribe, will be accompanied by Mr. Kent Tupper; The Honorable Stanley G. Jones, Chairman of the Tulalip Tribe of Washington, accompanied by Mr. Douglas Bell; the Honorable Hilda Manuel, Chief Judge of the Tohono O'odham Indian Nation, representing the Intertribal Council of Arizona; and Ms. Violet Mitchell of the Fort Mojave Tribal Council of Arizona.

Welcome to the committee.

## STATEMENT OF HON. DARRELL WADENA, CHAIRMAN, MINNESOTA CHIPPEWA TRIBE, ACCOMPANIED BY KENT TUPPER, TRIBAL ATTORNEY, MINNESOTA CHIPPEWA TRIBE

Mr. **Wadena**. Mr. Chairman, my name is Darrell Wadena. I am President of the Minnesota Chippewa Tribe and I want to thank you for allowing me to testify before this Committee to present the Tribe's views on S. 611.

The Minnesota Chippewa Tribe has some real problems with S. 611 in that we feel that it seriously dilutes the criteria for recognition. Bear in mind, Sir, that I'm not opposed to those tribes that are seeking recognition and are truly being delayed through the process that now exists. I also want to emphasize that there is a difference between tribes and Indians.

We have submitted some extensive testimony but I am going to summarize it as briefly as possible because you have other witnesses here that also want to testify before this Committee and I also want to give the opportunity to my attorney to present some of his views.

The **Chairman**. May I assure all the witnesses that your full text will be made part of the record.

Mr. **Wadena**. We have two situations back in Minnesota that have some bearing on this and right now we have some people who are opposed to tribal government and they are in the process right now of attempting to hold Constitutional Conventions. I'm just questioning whether or not under S. 611 that they would meet the criteria for recognition? In some situations they are seeking recognition for the purpose of gaming in some areas and that raises some questions and some concerns for us.

Second, the Minnesota Chippewa Tribe is comprised of six reservations. One of the reservations, Mille Lacs, in particular, is holding a referendum on May 16 with their people to seek approval for separation from the Minnesota Chippewa Tribe. Our contention is that they must hold a referendum tribal-wide and all 36,000 to 40,000 members would have to vote on that and approve it before they could separate.

Under S. 611 they meet all the criteria as far as land base, tradition, treaty—the whole gambit that is embodied in this bill—and I wonder if they could then bypass the process that we require under our Constitution and come under S. 611? If that happens with that tribe, we have five others that may want to do the same thing and we would have then secession from our tribe. I think the United States is aware of the last time there was secession; it became the Civil War.

Those then are some of our main concerns. Would they be able to follow our process as far as our Constitution is concerned or would they go forward under S. 611 and meet all the criteria of recognition? Our concern is mainly the traditional government-to-government relationship that we have with the United States that we now enjoy and we would like to have that preserved.

Although there may have to be some work done to streamline the process as far as Federal recognition is concerned, we would like our concerns addressed.

With that, Mr. Chairman, I will turn my time over to my attorney that he may at least give his views.

The **Chairman**. Would this provision apply to your problem? The provisions of this act shall not apply to splinter groups, political factions, communities or groups of any character which separate from the main body of an Indian tribe after the Indian tribe has been acknowledged as being an Indian tribe by the Federal Government unless it can be clearly established that the group has functioned since the separation from the main body of the tribe until the present as an autonomous Indian tribal entity. Would that suffice?

Mr. **Tupper**. Mr. Chairman, I think the concern of the tribe is that it's the last portion of that sentence. The Minnesota Chippewa Tribe is basically a confederation of six Chippewa bands. In fact, one of the bands is a confederation of several bands. They were reorganized under the Wheeler-Howard Reorganization Act because of the Nelson Allotment Act which applied the Dawes Allotment Act in Minnesota. It is quite unique compared to the other states and the position being taken after that Allotment Act was that there was only one tribe left, that the bands in fact agreed to become a unified tribe. There isn't any question that these bands have exercised autonomous power on their reservation ever since the Reorganization Act. The Constitution itself was rewritten in 1963 and provides the tribe has limited powers much like the Federal Government and the states do. There isn't any question that if the one band decides it is separating from the tribe that it can establish that it has treaties creating the reservation it is on, it has functioned as an autonomous government with governmental powers since that date. As the Chairman has indicated, if that's the process that all they would have to do is say that they were separating off, we've got the treaties, we've had autonomous government, we merely have to go through this process and we can skip the Constitutional provisions of doing a tribal-wide referendum. That is one of the great concerns the tribe has under this bill.

The CHAIRMAN. Even if that so-called separate group has had an autonomous existence since 1790?

Mr. TUPPER. They've had an autonomous government since contact with Europeans. The bands are——

The CHAIRMAN. We are talking about a separate group now.

Mr. TUPPER. Yes; but they are now part of the tribe. These bands have been evolving in the Chippewa Nation over the years as they've had their westward migration. The bands in Minnesota probably only occurred in the 1700s as they moved westward out of Eastern states. As treaties were executed in the middle 1800s, reservations were then set aside by the treaties. There was no Mille Lacs band in 1776, it didn't exist at that time, their reservation wasn't created until 1855, and that was the creation of that government. They are splinter groups that came off of either the Lake Superior Chippewas or the Mississippi Chippewas, the greater band or the greater Nation. So it has had an evolving history of its own that predate, of course, its relationship with the United States Government. But they do have, and they always have had, and that's their contention, that they've always been autonomous. They have not liked the Wheeler-Howard Reorganization Act though there was a sufficient vote of the Minnesota Chippewas to create this tribe under the Act in the 1930s and they seek now to leave the tribe without going through the Constitutional provisions.

The CHAIRMAN. Senator McCain.

Senator MCCAIN. Let me just briefly follow up. How would the provisions in S. 611 impact the Minnesota Chippewa Tribe, where a petitioner from across the Canadian border, perhaps Chippewa or other related tribe, would seek Federal recognition claiming to be indigenous under this legislation?

Mr. TUPPER. I'm sure this panel knows, the Canadian-American border was an arbitrary division across the Chippewa Nation. There are many Chippewa tribes, being in five states as well as in Canada. There are Chippewas that have crossed the border historically prior to the citizenship act.

They have no treaties and yet they occupy, as an example, the International Falls area of Minnesota, which is a border community with a fair number of Indian people residing in them. They may be able to meet the criteria of having an on-going entity. They are not eligible to be enrolled in the Minnesota Chippewa Tribe. I might just point out that the Minnesota Chippewa Tribe Executive Director informs me he has probably denied 10,000 requests for enrollments in the last 10 years.

Senator McCAIN. On what grounds?

Mr. TUPPER. On the grounds that they don't meet the blood quantum, which is 25 percent. There are a substantial number of people in Minnesota who have Chippewa Indian ancestry but they are not eligible to belong to this political entity that has been created with a Constitutional provision of a blood quantum. Many of them will maintain some type of political relationship for these many years. There is the Quincy Chippewa Council, whose members are eligible to receive per capita land disbursements. They have had conflicts with the tribal entity because they don't like provisions of land settlement acts that hold back money for economic development on the reservations, but they are not eligible to participate in those programs.

So those are some of the concerns. There are substantial segments out there that aren't, as far as the tribes 'concerned, entitled to that designation as a tribal government though they are clearly descendants of the people who executed treaties.

Senator McCAIN. Could you comment on S. 912?

Mr. TUPPER. To be perfectly honest, I haven't had a chance other than just a cursory glance this morning to look at it. But I think, as the Chairman has suggested, the tribe is not opposed to recognition of tribes that should be recognized. I think we're trying to point out that there are concerns that maybe haven't been thought of. As we all know, every time there is legislation, lawyers see it as kind of a social security program, you can look for more ways to litigate things. Everyone of these things has some legal complications or implications that somebody is going to be looking at as to can my group now be recognized, is this the legitimate group. I'm sure the Minnesota Chippewa Tribe isn't the only tribe that doesn't like this concept of the Wheeler-Howard Act, that felt it was an arbitrary imposition upon tribes, that they, in fact, were altered and these are Federal creations and aren't real tribes.

Senator McCAIN. We'd appreciate your written comments, Mr. Chairman, when you have had a chance to examine S. 912 and any recommendations you might have to make it better.

[Information to be provided appears in appendix.]

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Gorton.

Senator GORTON. No questions, Mr. Chairman.

The CHAIRMAN. Thank you. I now call on Chairman Jones.

## STATEMENT OF STANLEY G. JONES, SR., CHAIRMAN, TULALIP TRIBES, TULALIP, WA, ACCOMPANIED BY DOUGLAS L. BELL, TRIBAL ATTORNEY, TULALIP TRIBE

Mr. JONES. Mr. Chairman and members of the Committee, I am Stanley G. Jones, Chairman of the Tulalip Tribes of Washington. The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish Tribes and other Tribes and bands signatory to the Treaty of Point Elliott.

On behalf of the Tulalip Tribes, I thank the Committee for this opportunity to present this statement regarding S. 611. I would like to also thank Senator Gorton from Washington for being here today. I appreciate seeing our Senator here.

Mr. Chairman, we are unconditionally opposed to S. 611. This bill would make acknowledgement possible for several groups whose claims have already been denied administratively, judicially, and/or legislatively. Our tribal sovereignty, integrity, and resource base could be seriously damaged and our treaty rights impaired by this bill. Yet, neither the Tulalip Tribes nor our attorneys were contacted by the lawyers who were drafting the bill.

This legislation is drafted to favor certain unrecognized groups the Tulalip Tribes have opposed in their efforts to gain Federal recognition. Some years ago these same groups failed in their attempt to prove that they are tribes. A Federal District Court and the Ninth Circuit Court of Appeals said their evidence did not show them to be bona fide Indian tribes. The United States Supreme Court denied their bid for review.

They then petitioned the Federal Acknowledgment Project for recognition. One of the groups, the Samish, has been denied recognition by FAP for exactly the same reasons that the Federal courts refused to recognize them. The Secretary of Interior denied their appeal for reconsideration after a full review of their petition. They could have requested a judicial review but they did not. The FAP also made a proposed finding that the Snohomish group was not a tribe for exactly the same reasons that the Federal courts gave.

Mr. Chairman, this bill unlawfully provides for administrative reconsideration and overturning of prior Federal court decisions denying acknowledgment. Groups who petitioned and have been previously denied are unlawfully provided multiple additional opportunities for recognition under much easier standards.

The bill provides for automatic recognition of petitioning groups in the event of administrative failure to meet certain deadlines set up in the bill. Sometime, though the deadline is missed by one day, the petitioning group could be granted recognition.

Our treaty right has been judicially affirmed all the way to the United States Supreme Court and as a layman I have to ask the question: if this bill goes through in its present form and these groups become recognized, they obviously would insist on participating in the treaty fisheries—which, as I've already pointed out, has been judicially affirmed to us—and wouldn't this then raise a question of a Fifth Amendment taking?

Mr. Chairman, I would like to state in closing that in the 1855 Treaty of Point Elliott, the signatory tribes and their members agreed to move to and settle upon the reservation. The tribes and bands to which the Tulalip Tribes are the successors did so, including the Skykomish, Snohomish, and Snoqualmie Tribes, and continue to reside there. The reorganization of the reservation Indians as the Tulalip Tribes of Washington under the Indian Reorganization Act created a merger or confederation of these tribes. One should not be misled by the fact that the name "Tulalip" does not appear in the treaty. The on-reservation Snohomish and Snoqualmie Tribes and other on-reservation tribes and bands that merged under the IRA reorganization adopted the name "Tulalip" from the name of the large bay on the reservation known as the Tulalip Bay, and the plural name "Tulalip Tribes of Washington" to signify that the reorganized entity under the IRA is a confederation of multiple tribes.

Now some 125 years later, through the provision of S. 611, they require the United States to break faith with those of us who have kept our word, removed to the reservation, and have lived there from treaty times onward. Members of the historic tribes who refused to move and to comply with terms of the treaty, they forfeited their rights, Mr. Chairman.

Thank you, Mr. Chairman. I would now like to present our counsel, Douglas Bell.

[Prepared statement of Mr. Jones apears in appendix.]

Mr. **Bell**. Thank you. As both the Chairman and the Vice-Chairman indicate, the timeliness, the cost-effectiveness, and the lack of finality of the FAP process is such that legislation is required. I would just like to point out that as Chairman Jones has indicated, we have litigated the issue for 7 years and we have a final court decision. Mr. Chambers indicated the Stillaquamish were traditionally recognized and the United States has honored that. The United States is not honoring the judicial decision that the five additional intervenor tribes, the so-called Snohomish, Snoqualmie, Samish, Duwamish, and Stillicom are not tribes. There was a full hearing before a Master in 1976. There was a hearing *de novo* again before Judge George Boldt, who would be mischaracterized as anything other than a friend of the Indian people, and it then went to the Ninth Circuit, and was denied by the Supreme Court. These people, these descendants—which they admittedly are descendants, but descendants only—are not Indian tribes.

The **Chairman**. Let me assure one and all that the measures before us are in no way the final product. This is just part of the process. Obviously, time and resources did not permit us to confer with every tribe in this Nation, but we're going through the process now. We will not railroad anything. If that was our intention, you wouldn't be sitting here. Although my name is the first one that appears on this bill and as such as the author, I did not draft every word. It was put together by a task force and I have my own questions on some of the provisions myself. So let me assure you that we will be involved in a rather lengthy and detailed process to make certain that whatever change we make in our laws will not only be fair and equitable, it will not in any way jeopardize the rights that you have. This is not intended to be one faction versus another. We know that the present system is a cumbersome one and in many ways is delaying the recognition of rights and privileges that Indians are entitled to.

Senator McCain.

Senator McCain. Thank you, Mr. Chairman.

Let me just thank the witness and elaborate on what you had to say. We also have another body, regrettably, that has to review this legislation also. So we will be going through a rather long process and I think you might have noticed in my opening statement, we have a lot of similarities and we also have some differences. Witnesses such as we have had on both sides of the issue will, I think, move the process of conciliation along and I think you have contributed a great deal to that process. We certainly would be remiss in our duties if we failed to consult with everyone and that's why we're pleased to have you here. We appreciate your coming such a long distance, both from the State of Washington and the State of Minnesota, and, of course, my friends from the State of Arizona. Thank you all.

The Chairman. Senator Gorton.

Senator Gorton. Chairman Jones and Mr. Bell, have you had an opportunity to look at the provisions of Senator McCain's bill, S. 912, and do you have any comments on that legislation?

Mr. Jones. No, Senator, we have not had enough time to review it. We only received it a few days ago and it will take some time to review.

Senator Gorton. But you intend to do so and you'll contact us with your views on Senator McCain's bill as well?

Mr. Jones. Yes, Senator, that's correct.

Senator Gorton. Thank you. I've looked at the materials which you've prepared. You have a section in your testimony which states that the bands or the claimants against you have concerns with S. 611 because of the recognition of your fishing rights. Can either of you enlighten us as to whether or not you speak for other recognized tribes in the State of Washington in your testimony on this bill?

Mr. Jones. Yes, Senator. At the fish committee meetings, I have contacted about 15 different tribes from the northwest that are affiliated with the Northwest Indian Fish Commission and I've sent them each a copy of this testimony here and some other material. We're getting some pretty good support and they promised they would be sending their views in.

Senator Gorton. One of the earlier witnesses, whom you've listened to here today, in a conversation with Senator McCain discussed whether or not a recognized tribe could admit to membership persons who were very clearly Indians but who had not historically been a part of that tribe. Has the Tulalip Tribe or any other in the State of Washington or the Northwest considered the advisability or the appropriateness of offering tribal membership to any Indians in the State of Washington who are now members of tribes or bands which are not recognized?

Mr. Jones. No; in the Tulalip Tribes you have to be a direct descendant of one of the signatory tribes, you have to be on the 1936 roll of the IRA, and you have to have moved to the Tulalip Reservation. The descendants of the Reorganization Act under the original roll of 1936 and their descendants can become a tribal member. However, if some of them have moved away and had no continued relationship with the tribe and they have had a child and the child has a son or daughter, then that son or daughter will not be able to be enrolled into the tribe because they have to show that they have at least lived on the reservation for one year. Then we have an adoption ordinance requiring that a person has to be one-quarter blood.

Senator GORTON. Thank you.

The CHAIRMAN. Thank you very much.

May I now call on Chief Judge Manuel.

## VIOLET MITCHELL, REPRESENTING THE INTERTRIBAL COUNCIL OF ARIZONA, ACCOMPANIED BY HON. HILDA MANUEL, CHIEF JUDGE, TOHONO O'ODHAM NATION, AZ

Judge MANUEL. Thank you, Mr. Chairman.

My name is Hilda Manuel and I am the Chief Judge for the Tohono O'odham Nation in Arizona. Violet Mitchell is representing the Intertribal Council and I'm accompanying her just to offer some comments from a tribal perspective.

Ms. MITCHELL. Good morning, Mr. Chairman and members of the committee. My name is Violet Mitchell. I am a staff person with the Intertribal Council of Arizona. Hilda Manuel and I are here for Nora Garcia, who was scheduled to be here but because of a family emergency was unable to make it.

We've given you copies of the testimony that we're going to present and I'll just very briefly read some comments from that.

The Intertribal Council of Arizona represents 19 tribal governments who exercise self-government as an inherent right and as provided for by Federal statutes and Federal court decrees. We appreciate the opportunity to comment on S. 611, the Indian Federal Acknowledgment Administrative Procedures Act of 1989.

The Intertribal Council of Arizona opposes S. 611 because of the damaging impacts that the legislation would have on Indian people and Indian tribes.

The proposed legislation, S. 611, attempts to address the concern with the Federal Acknowledgment Process regarding possible inconsistent standards due to the different entities involved in reviewing claims. We recommend that this be resolved by codifying the process of review and codifying the evaluation criteria. Likewise, since there was concern that was noted in S. 611 regarding (1) the lengthy review process, (2) inadequate financial resources for research by petitioners, (3) failure to fully protect a petitioners right to due process, and (4) lack of objective administrative review and appeal, our recommendation would be that Congress appropriate funds to evaluate the Federal Acknowledgment Process Office and adequately staff the office.

Once the evaluation is completed and the strengths and weaknesses are identified an action response should be developed and implemented immediately.

If the amount appropriated to carry out the provisions of S. 611 were applied to the current Federal Acknowledgment Process, it would allow for a more professional, effective, responsive, and timely review of cases.

The Intertribal Council of Arizona has had an opportunity to review S. 912, introduced by Senator McCain. The bill would establish administrative procedures for recognition of the existence of certain Indian tribes. Senator McCain's bill will also ensure that the special government-to-government relationship between the United States and Indian tribes has a consistent legal and historical basis in order to recognize the inherit sovereignty of federally recognized Indian tribes.

The Intertribal Council of Arizona strongly supports the concepts of Senator McCain's bill that will allow for the improvement of an existing system by providing specific timeliness for review as well as outlining definite standards for review of petitions.

Thank you for allowing us to respond to S. 611.

The CHAIRMAN. Senator McCain?

Senator MCCAIN. Thank you, Mr. Chairman.

Ms. Manuel, as a tribal court judge, could you address the concerns raised by some witnesses that the current process does not provide adequate due process to petitioners and that a more equitable process is required. S. 611 would create an appellate panel of anthropologists and historians rather than a traditional form of judicial review. S. 912 calls for review by administrative law judges or the Federal courts. Do you think any particular approach is preferable?

Judge MANUEL. Yes I do. Actually, it is neither of the two that you've brought up. My feeling—and I really haven't had a great deal of time to review both of the bills that are being discussed today—but one of the things that has always struck me about the right of a tribe to determine who makes up its membership is that it does that based on several factors. People who belong to that tribal group grow up learning language, the unity of extended families, living within communities that have been identified as belonging to a group of people for long periods of time. When the Federal Government began requiring that tribes, in order to be acknowledged by the Federal Government as political units or entities, establish some kind of criteria to determine its membership, I think it effectively undermined a lot of the inherent and uniquely tribal or cultural processes that tribes had in place to identify itself as a tribal unit or as a cultural unit.

One of the problems that it has caused is exemplified by the situation we have at Tohono where we have two bands of O'odham people who clearly are O'odham but because of the membership criteria that was developed as a result of the Bureau's requirements they cannot qualify. Under the legislation, it looks like they would be able to seek recognition as separate tribes, which would have the dual effect of undermining a tribal decision perhaps that they are not eligible because of the criteria that the Federal Government has imposed on the tribe to determine membership, but on the other hand, it works effectively to deny these bands who many O'odham people who are members of the Tohono O'odham Nation recognize as fellow O'odham.

I think that some consideration ought to be given to the self-identification process and the role that the tribes clearly are qualified to exercise. If a group of people who have existed as a cultural unit or as a tribal unit for generations historically, with whatever means you use to measure that, and clearly identify a group of people as members of themselves, then I think the Federal Government should accept that self-identification by the tribe and not question it to the extent that it now does. There's just a lot of red tape and a lot of bureaucracy that's involved in recognizing groups petitioning as tribal groups, and recognizing that the experience of the Federal system is not one where much credence is given to tribal points of view or tribal decisions.

I guess I would prefer that if there is any kind of review of adverse decisions to a petitioning group, that there at least be a panel of people who are clearly experienced and knowledgeable of tribal people and the kind of membership criteria that perhaps are significant to them.

Senator McCAIN. Thank you. As a judge, could you address the issues of finality of administrative and judicial decisions which would reopen issues previously decided? What problems do you see with that?

Judge MANUEL. Again, I think that if a decision has been made—for example, a tribal group has provided its input into a situation to indicate that at least under the criteria that they themselves have established a petitioning group that may be related to the tribe is not eligible and should not be considered—and once that decision is made at the different levels, the local level, different stages within the Bureau, and when it gets to the final decision, I think the decision should be final. To allow groups that have been through the process to reopen their claims under new legislation or under new authority would, I think, effectively undermine the whole recognition process.

Senator McCAIN. Thank you very much.

The CHAIRMAN. Thank you, Senator McCain.

Judge, from your testimony, is it correct to assume that you approve of the BIA process on the matter of splinter groups?

Judge MANUEL. No, I don't think I intended to give that impression. I really don't approve of any process where a tribe has to be second guessed or a group of people that have been historically or traditionally united as a cultural unit have to be second-guessed by a bureau official or someone who is not connected to that group. My concern is that the legislation would allow bands of larger tribal units to petition because of the mechanism that is provided in the legislation.

The CHAIRMAN. Do you prefer the mechanism provided in the BIA process?

Judge MANUEL. No; I have not had any experience with the mechanism.

The CHAIRMAN. What do you say, Chairman, on the mechanism provided in the BIA process?

Mr. WADENA. It tends to be cumbersome and it takes a lengthy amount of time. I don't think tribes should be subject to that. I think there should be a limitation on the process so that it goes through in a timely manner.

The CHAIRMAN. All of you are concerned about so-called splinter groups separating and petitioning for recognition and acknowledgment. Do you believe that the present criteria set forth in the BIA process adequately addresses that?

Mr. WADENA. I really haven't had a chance to assess the Bureau process, Mr. Chairman. I would say just from the little experience that I have had that it does provide some safeguards against that but I'm not sure they are adequate.

The **Chairman**. The words in S. 611 are almost identical to the BIA words. If we changed it and made it identical to the BIA regulation, would that suffice?

Mr. **Wadena**. I'm not sure. I think it requires some modification as far as the word is concerned, but to make it verbatim with what the Bureau FAP process is I'm not sure is what we'd want. What we're concerned with is that we're safeguarded against those splinter groups from breaking away from the tribe and forming their own tribe and being recognized.

The **Chairman**. In fact, S. 611 is consistent with the BIA process and I am just wondering why you are in favor of the present process but against the S. 611 process.

Mr. **Wadena**. I'm not so much in favor of the present process.

The **Chairman**. I see. Well, I thank you very much and I can assure you that your words will be very carefully weighed and your suggestions will be considered very seriously.

Senator **McCain**. Mr. Chairman.

The **Chairman**. I am sorry, Senator Murkowski.

Senator **Murkowski**. That's all right. This is not a matter relative to the panel. I would like to take this opportunity to ask that a letter from Governor Cooper, Governor of the State of Alaska, dated May 5, 1989 be entered into the record concerning the State's views on Senate Bill 611.

The **Chairman**. Without objection, so ordered.

[Letter from Governor Cowper appears in appendix.]

Senator **Murkowski**. And from the professional staff, I would request that we get an interpretation of the Chairman's intention in this bill with regard to its neutrality of the issue of the status of Alaska Natives. It is a very complicated section of the bill (section 7(8)(2)(b)), linking the acknowledged Indian tribes with Alaska Natives possibly carrying overtones of sovereignty, *vis a vis* being neutral on it. We need a clarification, and I would submit this formally in the record for review by the Committee.

The **Chairman**. I can assure you that the staff will do that.

Senator **Murkowski**. Thank you, Mr. **Chairman**.

[Information appears in appendix.]

The **Chairman**. What is the latest in Alaska on the oil spill?

Senator **Murkowski**. Well, Mr. Chairman, the cleanup is occurring. The Vice President was in Cordova yesterday and met with a number of officials and fishermen, he went out on a large naval vessel that is being utilized to berth civilians who are involved in the cleanup, and he met with our Governor in Anchorage.

The technology of using steam on oil, as you know, Mr. Chairman, works quite well, but in using steam you cause damage to the beach life, the clams and the kelp. So if you can't use steam, then you use cold water, and cold water doesn't wash the oil away. So we've got a difficulty with the choices and the cleanup is proceeding slowly. We hope that the long-term damage will be relatively insignificant in the sense of our current fish runs but we still don't know what it may be. We've cancelled some openings, so those fishermen are facing loss of revenue, but whether the main runs of salmon will be available, we'll know in another two or three weeks.

It's a long, complicated process and there are a lot of things we're learning as we go.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. I can assure you that our sympathy is with you and the people of Alaska. We had an oil spill in Hawaii but it was like comparing a barrel with a thimble.

Our next panel consists of the Executive Director of the Confederated Historic Tribes of Michigan, Mr. Phil Alexis; the Honorable Helen Gindrat, the Vice Chairwoman of the United Houma Nation of Louisiana, and she is accompanied by Mr. Bruce Duthu; the Honorable Ray White, Chairman of the Miami Tribe of Indiana; and the Honorable Don Widdis, Chairman of the Gay Head Wampanoag Tribe of Massachusetts.

Lady and gentlemen, welcome. May I call upon Mr. Alexis to proceed?

## STATEMENT OF PHIL ALEXIS, EXECUTIVE DIRECTOR, CONFEDERATED HISTORIC TRIBES OF MICHIGAN

Mr. ALEXIS. Good morning, Mr. Chairman. We bring you good cheer from the Indian people in the State of Michigan. My name is Philip Alexis and I'm the Executive Director of the Confederated Tribes of Michigan and a member and former Chairman of the Pokagon Band of Potawatomis. We thank you for the opportunity to present oral testimony today on S. 611, the Federal Acknowledgment Administrative Procedures Act because the issue of Federal recognition is the single most important issue to the Confederated Historic Tribes of Michigan.

Our organization is unique in that we are a nonprofit organization consisting of three state-recognized tribes in Michigan as well as one which was recognized by the 100th Congress. Our members include the Burt Lake Band of Ottawa and Chippewas, the Huron Potawatomis, the Pokagon Band of Potawatomis, and the Lac Vieux Desert Band of Lake Superior Chippewas. Each of these tribes has an active tribal council and is represented by two members on the Board of Directors. We are a nonprofit corporation, chartered and funded by the State of Michigan with two principle objectives: (1) to gain Federal recognition for our members and (2) to assist the member tribes in obtaining Federal and state funds and services.

Our member tribes have authorized this testimony provided on S. 611. Michigan is unique in that one-third of the Indian population is not federally recognized—approximately 20,000 Indians out of a total population of 61,000. For years, the nonrecognized tribes have been unable to secure programs and services. To overcome this problem, the leadership of our bands worked together with the Michigan Commission on Indian Affairs and obtained state recognition which led to the establishment of the Confederated Historic Tribes in 1987.

Our member tribes are currently in various stages of the petition process in the Bureau's Acknowledgment Research process. On the basis of our experience, we strongly concur that the existing process must be improved and streamlined and we commend the Committee for addressing this issue. This morning, I would like to briefly outline problems which we have confronted and also to address some aspects of S. 611.

Under the present system, there are two basic problems which confront tribes seeking recognition:

First, we believe that the BIA has a vested interest in not recognizing new tribes based on a competition for scarce resources—BIA programs and services. The existing BIA budget is seriously inadequate for the existing tribes and we think that the BIA, as an unwritten policy matter, uses the FAP process to make it as difficult as possible for tribes to gain recognition. We suspect that the BIA's reluctance to add new tribes to the family of federally recognized tribes is an underlying reason for the agency's reluctance to adequately staff the BAR. This creates endless delays for the petitioning tribes.

Second, unrecognized tribes simply do not have the core management staff or resources to conduct the necessary work for a petition. For example, a petition could cost roughly $200,000. In Michigan, our organization will overcome this problem to some degree by providing technical assistance and by obtaining grants and other resources, but the tribes still have a fundamental need for resources for core management staff. Ultimately, the unrecognized tribes are forced to rely upon charitable contributions but even leveraging this support requires some semblance of a tribal staff.

Mr. Chairman, we recognize that S. 611 is a controversial bill in Indian country because of concerns about competition for scarce Federal resources and also the proposed definitions in the bill which would alter longstanding interpretations of Indian law. Accordingly, we make the following recommendations:

First, inclusion of allies in the definition. Section 7(b)(4) of the bill would allow a tribe to include among its membership, members of tribes allied with or related to the original group. This provision would not be of interest to our members and we recommend that it be deleted because of the new precedent which it would establish.

Second, timeframes. The bill imposes rigid time frames upon both the BIA and the petitioning tribes. We understand that this is an attempt to move the process along in a timely manner but we are concerned that this could work against the petitioning tribes. In our experience, the lack of core management staff often makes it impossible for the tribes to respond to requests for information and data on a timely basis. We would recommend more flexibility in these time frames.

Third, De facto Recognition. The bill would allow a tribe to become recognized de facto if the BIA misses two of the deadlines created in the legislation. Given the BIA's track record, this is guaranteed to happen and while it might benefit our members, we also believe that it opens the door for recognition to groups which may not have a legitimate claim.

Fourth, ANA funding. We appreciate the provisions of the bill which authorizes ANA grants for petitioning tribes to work on petitions and to carry out essential governmental functions while the petition is in process. However, we feel that the amount should be raised to approximately $100,000. In addition, the definition of "essential governmental functions" needs to be clarified.

Fifth, budgets for newly recognized tribes. Mr. Chairman, the underlying concern over recognition of new tribes relates to economics. Unfortunately, as new tribes have gained recognition in the past 20 years, there has not been corresponding increases in the BIA and IHS budgets to accommodate increased service needs. The result has been a smaller pot of funds for all tribes and increased competition for Federal funds and services. We understand this concern. Although the BIA does provide a minimal amount through the New Tribes Initiatives Program, the overall budgetary needs of new tribes are not included in the BIA's overall budget. This year, for example, Lac Vieux Desert Band has only received $20,000 from the BIA, a ridiculously low amount.

We recommend that the committee consider the development of a formula to develop budgets for newly recognized tribes. Such a formula should consider the basic governmental, health, education, and service needs of a new tribe. The formula should provide for a basic startup budget which phases in over a period of 5 years or so, until the new tribe reaches parity. Finally, it should then be mandatory for the BIA to include the new tribe's base budget in subsequent budget requests as an increase to the overall budget.

The Confederated Tribes would like to provide the Committee with a more detailed proposal for a New Tribes budget formula for your consideration. We could have a proposal back to the Committee within the next 2 months.

Thank you, Mr. Chairman, for your concern which you have shown for the Indian people of this country who have a legitimate case for Federal recognition but were bypassed because of historical circumstances. We appreciate your concern and stand ready to work with the Committee on this issue which is critical to the Confederated Historic Tribes of Michigan.

The CHAIRMAN. On behalf of the Committee, I thank you for your offer of assistance. I have just one question for you. You have many who are not federally recognized. Do you have those who are State-recognized but not federally recognized?

Mr. ALEXIS. The Confederated Tribes presently is made up of three tribes who are state recognized but not federally recognized. We don't include all of the tribes that may have petitioned the Federal Acknowledgment people, and of those we probably have 7 of 13 tribal groups in the State of Michigan that could be federally recognized.

The CHAIRMAN. What were the problems confronted by your federally unrecognized tribes who petitioned the BIA?

Mr. ALEXIS. I talked a little about it. I think one of our biggest problems was to respond to the criteria—seeking the expert anthropologists to put together the ethno-history of the tribe; putting together the tribes' membership, placing them on treaty rolls or whatever forms they were using to meet the criteria; and lack of core staff to respond to questions, to communicate and coordinate with BIA, and to put them in place.

The CHAIRMAN. How long has your tribe been petitioning the BIA?

Mr. ALEXIS. The Pokagon Potawatomis asked for Federal recognition in 1934 and due to Bureau policy, there are communications that we have included in our petition that at the time I think the

Interior Department took objection to recognition of certain Michigan tribes south of Mount Pleasant. The group has probably been working on Federal recognition since 1934. Officially, we have been in the process now for the last six years. We have a petition that has been submitted to FAP and we're working through the system.

One of the other groups in our Confederation, the Huron Potawatomis, approximately seven years ago were within the top five tribes for Federal recognition. They have been putting together a study to address the letter of deficiency which they have received from the Bureau of Indian Affairs.

The other group, the Burt Lake band, is right now putting together its ethno-history and membership criteria.

The CHAIRMAN. May I now call on Vice Chairwoman Gindrat?

## STATEMENT OF HON. HELEN GINDRAT, VICE CHAIRWOMAN, UNITED HOUMA NATION, INC., GOLDEN MEADOW, LA, ACCOMPANIED BY BRUCE DUTHU, ESQ., NATIVE AMERICAN PROGRAM, DARTMOUTH COLLEGE, HANOVER, NH

Ms. GINDRAT. Thank you, Mr. Chairman and members of the committee.

For more than 10 years the United Houma Nation, Inc. has been attempting to complete a petition for Federal acknowledgment. The process has placed enormous strains upon the tribe, as I am sure it has upon other petitioners. We submitted a documented petition in 1985. In December of 1986 we received our first Obvious Deficiency (OD) letter which was so full of misstatements that the Branch of Acknowledgment and Research withdrew it after complaints from our attorney. In May 1987 we received a second deficiency letter which described concerns the BAR had about the community description. We acted in good faith in these requests for information, and with the assistance of the Native American Rights Fund, responded to the requests, particularly concerning community. We sent them maps and specified where each Indian home was located, and more ethnographic detail than I believe of any other petition. You can imagine our shock and disappointment at receiving another letter of deficiency in March 1989, containing more requests for data—items such as the number of people who attended each ceremony at our pow-wow and requests for information about tribal councils in the nineteenth century. This last request ignored the fact that in the petition we stated there were no tribal councils in the nineteenth century.

We are a poor tribe and cannot continue to support what amounts to sort of a fishing expedition on the part of the staff of the BAR. There needs to be some limitations placed on their continuous requests for information. Some standards have to be set that give petitioners some sense that they have provided enough information to meet the criteria. It is our believe that the BAR has changed the standards over the years that we have been working on our petition so that what was acceptable a few years ago is no longer enough.

This is why we support S. 611. We believe that if the bill is adopted it will provide standards that petitioners and the BAR staff can understand—standards that can be judged and that are equitable. We support the legislation because it provides a reasonable means of appeal should the BAR make a negative finding. As it is now, such an appeal is lacking. The changes do not make acknowledgement easier but it does make it possible.

I attended the meeting with the BAR on the last OD letter and I must say I was frankly disappointed and depressed by what heard. It is not easy for me to say this because I fear there may be reprisal against my tribe. I wonder, given the extraordinary way we have been handled by the BAR, whether we are being punished for questioning their judgment on the first OD letter. But as fearful as I am, I must state the case and facts as I see them.

I want to thank you very much for hearing our testimony.

The CHAIRMAN. How many members do you have in your tribe?

Ms. GINDRAT. We have over 11,000 members.

The CHAIRMAN. They all live in this area in Louisiana?

Ms. GINDRAT. Yes, sir; they do.

The CHAIRMAN. And the land that you are on, is that tribal land?

Ms. GINDRAT. We have a section in one parish that we bought from the public school system that belongs to the tribe, which originally was an Indian school and they bought the building and this tract of land.

The CHAIRMAN. How much has it cost you to pursue this?

Ms. GINDRAT. I don't have the exact figures, but it has cost us quite a bit of money, which we don't have. We have no way of generating money.

The CHAIRMAN. Have you looked over Senator McCain's bill, S. 912?

Ms. GINDRAT. No, sir; I have not.

The CHAIRMAN. Would you look over that bill and give us your thoughts on it?

Ms. GINDRAT. We will.

[Information to be provided appears in appendix.]

The CHAIRMAN. Senator Murkowski.

Senator MURKOWSKI. No questions, Mr. Chairman.

The CHAIRMAN. Thank you very much Ms. Gindrat.

May I now call upon Chairman White.

## STATEMENT OF HON. RAY WHITE, CHAIRMAN, MIAMI TRIBE OF INDIANA, MUNCIE, IN, ACCOMPANIED BY STEWART RAFERT, HISTORIAN

Mr. WHITE. Thank you Mr. Chairman and members of the Committee. My name is Raymond White and I'm Tribal Chairman of the Miami Indians of Indian. I am accompanied by Dr. Stewart Rafert, our ethno-historian.

Mr. Chairman and members of the Committee, I am pleased to be here today to explain the problems the Miami Tribe of Indiana has had in pursuing Federal acknowledgement under the current procedures. Dr. Stewart Rafert, who is accompanying me here today, is the historian who worked with us in preparing our petition. We are proud that our petition is regarded as a model for the Nation by the Branch of Acknowledgement. We are angry that we have been in the petitioning process for over 10 years.

Mr. Chairman, 5 minutes is far too little time to explain the nearly 5 years of frustration we have experienced since we submitted our petition. We first notified the BIA in April 1979 that we would file a petition. Our tribal history, both as a community and in Federal relations is complex. The Administration for Native Americans began granting us research funds in 1982. At that time, Dr. Rafert had already devoted 5 years of research and some $50,000 in private grants to research on our community.

We submitted our petition on July 10, 1984. By twisting the arm of the Branch of Acknowledgment, we got our Obvious Deficiency letter 6 months later on January 30, 1985. In October 1985, we filed our answer. After that, things really slowed down. Our petition was not put on active status until March 1, 1988. Then the Branch of Acknowledgment decided to contract out our anthropology and genealogy for outside review. Letting out this contract took 13 months, using up our entire active period. On March 6, 1989 the Branch informed us that they were extending our proposed finding to February 18, 1990.

Mr. Chairman, the reason given for extending the finding on our petition was that, "the voluminous character of the materials in this case requires a longer than usual period for consideration." What are these "voluminous materials"? They are none other than Federal rolls of our Tribe made in 1846, 1854, 1881, 1889, 1895, 1969, 1972, and 1984, 42 congressional reports on our tribe from 1846 to 1941, various court cases, unbroken correspondence from our leaders since 1846, and a detailed ethno-historic analysis of our community. We are a well-known historic tribe, most of whose members live in their ancient homeland, whose leaders never relinquished Federal recognition, even though it was administratively removed in 1897. It seems as if the very evidence of our standing as a tribe is being used to delay our Federal recognition.

We believe our experience is a case study in the failure of the current procedures for Federal acknowledgment. We are a coherent tribal community that had Federal status until it was administratively removed in 1897. We have tried consistently since that time to restore recognition of our tribal government and treaty rights through legislation, the Indian Reorganization Act, and current procedures. Since 1982, we have spent $241,000 in Administration for Native Americans (ANA) funds and $128,000 in other funds—a total of $369,000 on Federal recognition. We have done every bit of our work in a timely and highly professional manner, but still we do not have recognition 12 years after our research began. We believe that what has happened to us is asking too much of any small Indian community.

We support the provisions of S. 611 for section 7(c) and 7(d) petitions because they put some realistic time constraints on the recognition process. As it stands now, the active phase of a petition can be delayed for years, and once a petition is activated, there seems to be no real effort to stay in compliance with the limited time constraints of 25 CFR 83. If we were operating under the time frames of either section 7(c) or 7(d), we would have been federally recognized long ago. Using 7(d), which fits us, we would not have had to spend $369,000 proving we are an Indian tribe.

Finally, Mr. Chairman, we agree with S. 611 that the acknowledgment process should be removed from the BIA and put in Interior. The BIA has been too slow and inattentive to the needs of our people. The real cost of this delay has been to our young and our elderly, and to our unemployed. We have missed out on years of tribal development and services while our petition has been stymied. Something must be done. We urge passage of S. 611.

Thank you, Mr. Chairman.

The **Chairman**. Thank you, Mr. Chairman. Have you looked over Senator McCain's bill?

Mr. **White**. No; I haven't, but I plan to look over it and I will send in our testimony on that.

The **Chairman**. Has the Bureau provided you with any official reason for this delay other than voluminous documentation?

Mr. **White**. I was up here last year when you had your hearings and you asked the Branch of Acknowledgment if they had ever asked for help and they said, "No". You told them to ask for help and they never have. They only have two or three person crews—the historian, the genealogist, and the anthropologist. We went through this about 3 or 4 years ago when if one person out of that crew would happen to quit or be sick or disabled or whatever, you've lost one-third of one of the crews and they only have two crews. That's one of the reasons why I liked S. 611.

I haven't read Senator McCain's bill yet but I surely will.

They keep putting us on the back burner and they kept telling us they were going to do us a favor and put us on active consideration. The only thing that bothers me is when you have the Bureau sitting up here and they are telling us that we have to abide by the Federal regulations in 25 CFR, then they can in turn be 6 months out of regulations, but tell us that we have to live by 25 CFR and they can thumb their noses at it. That's what really bothers me. If we have to live by it, they should have to live by it too. They are going to be at least 6 months out of complicance which would be another 18 months on our Federal recognition.

The **Chairman**. How many members are there in your tribe?

Mr. **White**. In a service area in our historic homeland in the State of Indiana, which takes in six counties, we have 1,500 people. With the latest census on our Federal recognition, nationwide we will probably go 5,000 to 5,500 when it is all completed.

The **Chairman**. Thank you very much.

Mr. **White**. Thank you.

The **Chairman**. Our next witness is Chairman Widdiss.

## STATEMENT OF HON. DON WIDDISS, PRESIDENT, WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, STATE ROAD, MA

Mr. **Widdiss**. Thank you, Mr. Chairman and members of the committee.

I suppose, after going through all the testimony that has been previously read and orally presented, it comes down to a tribe who became recognized in 1987 to try to sum it up. The Gay Head Wampanoags have documented history from 1602 with contact with settlers. Our history is one that if he says "voluminous", you can add to that. There is documentation providing us with a good base for our case. I think we need to show some perspective as to our position.

We support S. 611 for a number of reasons and they relate directly to our involvement with BIA going through the recognition process. We are, as far as I know, the only tribe that was given an official negative finding and turned it around through the FAP process. I may be mistaken, but I don't think so. There were other tribes that went the legislative route but we were precluded from doing so at the time. We had a negative finding in 1985 and that finding was based on what we considered to be a less than reliable reading of the data that was presented. In order to get to a point where the Federal acknowledgement project at the time could deal with that data and understand the context in which our tribe was presenting it meant that they also had to understand our legal situation. I think it makes sense for the committee to understand that too.

In 1973, our tribe filed a Non-Intercourse Act suit against the Town of Gay Head for the return of tribal common lands. It was a suit which was a sister suit to the Maine suit *Passamaquoddy* v. *Morton,* and was held in District Court with various motions back and forth until around 1976. At that time, the Federal Government was beginning to review the threshold issue of tribal existence and recognition as it relates to Non-Intercourse Act suits. We found there was a basic problem in that although we may be able to work a legal remedy to our problem, Congress was not going to go along with it unless we held tribal status.

We looked for an avenue by which we could satisfy this point, having been surprised by the fact that having been identified as Indian and as a tribal unit for centuries, the Federal Government would now say we were not on the roll. So we took a little time, along with the help of anthropologists, historians, lawyers, naturally, getting to the point where it seemed an impossible task. We were being forced by District Court to go to trial. It was the same time as the *Mashpee* case. *Mashpee* was put in a box legally. The legislative branch was asserting that they had no jurisdiction, so whatever they said was not going to matter. In the end, the Congress had the final determination. That was our opinion and we sought a negotiated settlement with the State, with the Town, and with some interested non-Indians. We got to the point where a coalition of New England Tribes, through the New England Indian Task Force, lobbied for and successfully helped, I might add, in the promulgation of the FAP regulations in 1978. I think that when we get to this point in history in 1989, where we are going over some of the same issues which are the responsibility of not only Congress but of the Department of the Interior, I get the feeling that I've been here before.

I have a couple of problems with the process as it stands. First, we were not provided the necessary advocacy by the Bureau going through the process of Federal acknowledgment. Tribes tend to find this to be a fact and it continues to be a fact that there is no consistency in the implementation of 25 CFR 83, which are the Acknowledgment regulations. I am not going to go into a litany of our specific problems, but I would like to bring to the committee's attention the fact that we found a lack of consideration in terms of the professional application of those criteria. I think I'll let that statement stand as that.

Another problem was it seemed that most of the bias, and it was bias, on the part of the Department of the Interior was because of their inexperience with eastern tribes. We tend to be a little more independent just because of our situation, especially my tribe, we live on the western most part of Martha's Vineyard on some 3,400 acres. There are some tribes where your landholders use that for grazing, or pickups. There is no way for people to understand that on a 3,400 acre town a tribe receiving through a settlement approximately 475 acres has a significant case. I would tend to disagree.

The legal aspects of our District Court case at the time directly affected how Interior dealt with our petition. It was a direct reason for our tribe's being denied recognition initially in 1985. We appealed through the appeals process and found that the same people who managed to find a way to turn down our request for recognition were those who were going to review our appeal request. At the time, I thought it was odd and that perhaps we should have an independent panel. We did not. We were told this is the process, this is the way it is going to be. So we took rather an aggressive stance in terms of how we wanted to deal with our documentation. We provided another volume of refuting documentation to Interior. The response that we got from FAP was; Why are you being so hard on us? That's not a direct quote, but the initial response was one of consternation that we had the audacity as a tribe to tell them that their scholarship and the results of their professional application was wrong, which is how we attacked it. We were told at the initial submission of documentation that certain documents were not needed, we didn't have to provide everything we had and that it seemed what we had was sufficient. This relates directly to the internal procedures within the Federal Acknowledgment Process. The Bureau of Acknowledgment and Research (BAR), they keep changing, is in a position to make a judgment as to our applicability to the standards set forth in 25 CFR 83, not on the specific results of the regulations as promulgated by Interior. But by the fact that we managed to prove that the methodology to a certain extent was lacking, we were able to receive Federal recognition. That upset me, it upset my tribe, and it upset a number of people working with us. It is a situation which I do not envy the nonfederally recognized groups that are in the petitioning process right now having to put up with. Hence, my support for S. 611 in that it now provides us an avenue by which we can have the regulatory process address some of its failings as it exists now. It is not effective. It is not a process I would wish on anybody.

I can sympathize with the tribes that were here earlier that were testifying against the bill. I don't think they were testifying against S. 611, I think they were testifying against some of the legislative language that needs to be worked out and they needed to have their concerns heard. I don't think anybody here agrees that the process as it works now through the Department of the Interior is effective or appropriate for tribes.

In closing, what I would like to say is that I appreciate the committee making this a strong issue. I sit before you now a federally-recognized Indian and the elected leader of the tribe. I can only say that the process when it gets to this point and when it affects other tribes that may be in the same situation that we were as recently as 3 years ago, I can only pat them on the back and say, "Give them Hell". Because that's what they're going to have to do. I hope part of that is addressing the issue from within in terms of how those regulations are dealt with specifically by Interior and with the tribes. My only overall consideration is the Indian people be given fair and equal treatment. I don't think that's too much to ask.

[Prepared statement of Mr. Widdiss appears in appendix.]

The CHAIRMAN. Thank you. How many members do you have in your tribe?

Mr. WIDDISS. We have 580 members.

The CHAIRMAN. I thank you very much, all of you.

We now have a panel of expert witnesses: Dr. Jack Campisi, Anthropologist, Wellesley College; Dr. Raymond Fogelson, Anthropologist, University of Chicago; and Dr. William C. Sturtevant, Anthropologist, Curator of North American Ethnology, Smithsonian Institution.

Thank you for your presence and your participation in this hearing. It is very important. May I now call upon Dr. Campisi?

## STATEMENT OF JACK CAMPISI, ASSOCIATE PROFESSOR OF ANTHROPOLOGY, WELLESLEY COLLEGE, WELLESLEY, MA

Mr. CAMPISI. Thank you, Mr. Chairman.

I am going to focus on a few points in the bill that I think are significant and are well within our reign of interest and expertise.

There has been some comment that the criteria in S. 611 and the definitions in that bill would so weaken the process that all 114 tribes would march through unimpeded. That is just not true. By in large, the criteria and the definitions are taken from the existing process. If anything, S. 611 is more demanding than the present criteria. For example, there is nothing in the present criteria that requires tribes to show more than the existence of a contemporary community. To do that all they have to show is that they live proximate to each other, that their residency pattern is close enough for them to interact. Neither the language of criterion (b) nor the definition requires them to demonstrate they interact.

Proposal in S. 611 requires a showing of community over time. It requires the individual tribal members to show that they have the attributes of a community, it proceeds to define the nature of those attributes, and it provides methodological means to judge them.

Criterion (b) does not address social cohesion despite what's been said. S. 611 does. It is not going to be enough to say that we all live in the same neighborhood. Under S. 611, the tribe will have to demonstrate that they do, in fact, interact and have interacted over time.

Because of this change in the nature of the criterion and the definition, it is reasonable to assume that if a community exists over time, it has maintained some means of decisionmaking. That is anthropologically sound. If you demonstrate that a community existed at one time and that community is related to a community that exists at a later time, it is fair to assume that they have had political systems throughout, that they have a continuity of community and, consequently, the presence of a decisionmaking process.

Criterion (c) in the present regulations do not require any particular proof of political continuity from generation to generation. It just says you have to demonstrate political continuity over time. But there are significant research problems that tribes face that make it very difficult to meet the standard set up by the Bureau. For example, Florida passed a law in 1853 that said, "That from and after the passage of this Act, it shall be unlawful for any Indian or Indians to remain within the limits of this State, and any Indian or Indians that remain or may be found within the limits of this State shall be captured and sent west of the Mississippi." Now, if you have a group of Indians that remained within the limits of the State after 1853, you're unlikely to find very much documentation expressing the fact that they are Indians. Otherwise, they would have been in Oklahoma. So how can you meet a standard of continuity except by demonstrating that there is a community of people of Indian ancestry who acted together. You cannot find the documentation. Should they be penalized by that State's statute? Should other tribes be penalized by similar legislation, for example, North Carolina? I think not.

There is the question of generation to generation in the regulations, and we have placed a total time of 50 years for the failure to produce documentation. Generation to generation has no meaning. The branch has varied in its definition of generation to generation from 20 years to 30-some years, and even more in at least one case. We believe there are sound reasons to consider a period in the nature of 50 years. It has to do with the historical background of this country. It has to do with factors like the Civil War, which destroyed thousands and thousands of documents. We believe that there is at present time a period of time implied in the regulations, whether it is 25 years or 35 years, and that is an ill-defined period of time and allows too much flexibility for the staff to chose which number to use in which cases.

Finally, we've suggested a panel of experts for the legislation. A former member of the Branch of Acknowledgment and Research, Dr. William Quinn, points out in an article he wrote in 1988 that the Branch of Acknowledgment and Research has unchallenged power over the social life and death of a group. That's not a quote, it's a paraphrase. It was not the intention, as far as I could find out from John Shapard, one of the writers of the rules, and the others who promulgated the regulations, to have such a heavy reliance on documentation, such a heavy document burden. Nonetheless, that is what has been the result. With so much power vested in the Branch of Acknowledgment and Research, there needs to be an impartial body of experts to review the findings in the case of disagreement or to make recommendations to the Secretary. This is the least expensive and most efficient way to assure that mistakes are not made. The panel is not a judiciary branch, but when this process has been raised or lowered to a point where it is a game, experts and peer review are important. Individuals at the Branch of Acknowledgment and Research assert that they are scientists. They should be reviewed at some level by other scientists. We feel that the panel approach will prevent litigation and will speed the process and will give the Secretary additional information upon which to base his finding.

Thank you.

[Prepared statement of Mr. Campisi appears in appendix.]

The CHAIRMAN. Thank you very much, Dr. Campisi. What are your thoughts on the deadline?

Mr. CAMPISI. I think there have to be some kind of deadlines or some kind of penalty or some kind of protection for the tribe that petitions. I'm not sure that the deadlines in the bills are the ones that should be there. But as it stands now, tribes can go on for years and the Branch is under no impetus to put in deadlines. I don't think the deadlines in Senator McCain's bill are the answer. I don't think failure at the end of 6 years for the Branch to act and then for the petitioner to get a negative termination is the way to answer the question because in hot cases it's quite possible they might wait 6 years and give a negative determination, and let it go on to a court. The way that section of the bill is worded is a bit confusing. A petition is that document that is sent in that says we are petitioning. A documented petition is the result of that document that is acted upon. The language of S. 912 says that 6 years after the "petition". Most of these petitions were submitted before 1979 and if you took it at its face value, most groups would be eliminated before they got started. They'd all be in court. I don't think that was the intent but that is the language. But even if you used the time from a documented petition, I still think that is not the way to solve the problem. I would agree that there needs to be more flexibility in S. 611. The Department of the Interior needs to have at least some warning system. But 6 years ought to be enough, given proper staff, at least from what they say, to do the petition and to do it decently.

The CHAIRMAN. Are you suggesting that with the same quality or degree of implementation for S. 611 that exists for the present process, it may be more difficult going through the S. 611 process?

Mr. CAMPISI. I'm saying that if you change the criteria and the definitions to the way they are in the bill, tribes will have to do more work to maintain their argument. But tribes will know when they have done the work. The whole purpose of putting clauses in there that say when you have done this, it is conclusive evidence, is to give a tribe an indication that they've satisfied that criterion. As it is now, we just never know when we have satisfied the Branch. We keep getting letters asking for more data. No matter what you give them, they ask for more. It can't go on that way. You never know whether or not you've come close to the right answer. That's why I think some kind of conclusive evidence, something ought to be put in the bill that says when you meet these standards, you have answered that question. But the standards that you have in your bill, Senator, are more difficult.

The CHAIRMAN. Thank you very much, Dr. Campisi.

May I now call on Dr. Fogelson.

## STATEMENT OF RAYMOND FOGELSON, ANTHROPOLOGIST, UNIVERSITY OF CHICAGO, CHICAGO, IL

Mr. FOGELSON. Thank you, Senator Inouye and members of the committee and the staffs.

I have carefully reviewed S. 611 and I support it as a just and reasonable means for dealing with the serious problems of the current Federal acknowledgment process. It upholds, as Jack Campisi just said, the rigorous criteria in the acknowledgment process and it strengthens them by making less ambiguous some key concepts and should, therefore, facilitate their application to the specific cases.

My written testimony in support of S. 611 was completed last Sunday night and Monday morning and has been submitted for the record. On Tuesday I received by express mail S. 912. Teaching duties precluded my examining it until yesterday. Senator McCain and his staff are to be congratulated for preparing under such duress a thoughtful and a useful bill. The bill is particularly useful for our deliberations today since it helps highlight differences between S. 611 and current acknowledgment structures and processes. Therefore, I would like to present my initial reactions to S. 912.

By my reading, S. 912 essentially reaffirms, with some minor modifications, the present structure and procedures for handling petitions for tribal recognition. It maintains responsibility for acknowledgment processes with the BAR of the BIA. The problems of locating responsibility with the BAR have been raised by others and are addressed in my written testimony. The essential problems are: first of all, the possibilities of conflicts of interest; second, the direct or indirect influences of general BIA policies or attitudes on the judgement of petitions. For instance, if the BIA truly wants the Government to get out of the Indian business, this may affect the disposition of individual cases. Third, the BAR does not devote its full resources to acknowledgment processes, they engage in other work as well, so it is not a full-time task. I've often wondered why the BIA, with its primary responsibility of implementing Federal programs and providing services for the recognized Indian clientele, would want the added burden of handling acknowledgment.

S. 912 sets up reasonable deadlines for stages in the acknowledgment process, but it provides no teeth to ensure that these deadlines will be met.

S. 912 makes a distinction between Indian groups and recognized Indian tribes, which helps perpetuate the misperception of many that the Federal acknowledgment process is creating new Indian tribes. The distinction with which we are dealing is between recognized and unrecognized tribes, and I was glad to hear that Senator McCain clearly recognizes this distinction in his opening remarks this morning.

In section 2(12)(a), bill S. 912 insists on tracing the descent from a single tribe. If such a criteria were rigidly adhered to, I'm afraid that the deserved recognition of our Tulalip representatives could be questioned.

Section 2(13) of the new bill defines "continuously" as extending from generation to generation throughout the Indian group's history essentially without interruption. The vagueness here has caused past problems. How long is a generation? What are the reasons for the gaps in the documentation? How long can reliable oral testimony be extended? And there's a whole host of other problems, obviously. The criterion of political continuity is spelled out more precisely in S. 611, as Dr. Campisi has testified.

In section 3(2)(b), the definition of "splinter group" seems inadequate as it would deny recognition to many groups currently recognized if this idea of splinter groups were literally interpreted. For example, in the legal brief in opposition to S. 611 prepared by Douglas Bell and James Jones for the Tulalip Tribes, they state in footnote 2 on page 4, that on the basis of the *Cherokee Indians* v. *United States,* an 1866 decision which concerned dispersement of trust funds, the Eastern Cherokee were ruled ineligible because they had not lived up to the fraudulent Treaty of New Echota and had not removed west with their kinsmen. Bell and Jones say that, therefore, the Eastern Cherokees are a splinter group and would not be eligible for recognition as a tribe. I'm fairly sure my Eastern Cherokee friends and tutors would object strenuously to this Tulalip challenge to their legal status.

Perhaps the most ill-advised part of S. 912 is section 8(a), which stipulates that if no decision is reached on a petition after 6 years, the petition will "be treated as having been denied." This is surely an invitation to stonewall difficult or controversial cases and if enacted will doubtless contribute to the notorious slowness with which the BAR has processed petitions.

S. 912 does provide for a needed appeal procedure. But instead of advocating an independent panel of qualified experts, as in S. 611, it delegates this responsibility to the Office of Hearings and Appeals of the Department. The qualifications of this office on these matters can be questioned, and it would make the appeals process more adversarial than need be.

Finally, the appropriations for S. 912 come to $24 million, by my reading of the bill, while the appropriations for S. 611 add up to $18 million. If I can make an automotive analogy here, it seems as if the used car that has proven to be a poor performer in the past will cost more than a new car.

This admittedly cursory review of S. 912 persuades me to stand by my written testimony in favor of S. 611. We are indebted to Senator McCain and his staff for helping us to focus on some salient issues. I sincerely hope that S. 611, with or without minor modifications, can gain bipartisan support and be enacted by Congress in the near future.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Fogelson appears in appendix.]

The CHAIRMAN. Thank you very much.

What should our position be on the aspirations of smaller tribes who were forcibly placed into reservations with dominant larger tribes and were not signatories to any treaties but who have clearly a difference in culture, religion, language, etc.? You find these situations in California, for example.

Mr. FOGELSON. It is a very difficult question. I think it would have to be handled on a case-by-case basis. I can think of many examples where there are enclaves of distinctive tribes within larger groups that have been there for long, long periods of time and have more or less been assimilated by that larger group even though they may continue their own customs, languages, and so forth. I think of the Hano people of First Mesa in Hopi land, or, perhaps, the Tutelo people among the Iroquois. There are several cases like this. I think it should be at the option of the individual groups— if they feel they have enough integrity and evidence and so forth and wish to petition, I think they should be given that opportunity.

The CHAIRMAN. They should have the right to petition?

Mr. FOGELSON. Yes.

The CHAIRMAN. I thank you very much, sir.

May I now call on Dr. Sturtevant.

## STATEMENT OF WILLIAM C. STURTEVANT, ANTHROPOLOGIST, CURATOR OF NORTH AMERICAN ETHNOLOGY, SMITHSONIAN INSTITUTION, WASHINGTON, DC

Mr. STURTEVANT. Thank you, Mr. Chairman.

I would like to underline a few points in my written testimony and then add a comment on one topic that I didn't take up in that written document. I wrote comments on six important criteria, briefly comparing their treatment in S. 611 with how they are defined in the procedures that are now followed in the Code of Federal Regulations for FAP. As Senator McCain said this morning, these latter criteria that are in the CFR have been incorporated into S. 912, so, in effect, I am comparing the criteria proposed in S. 912. I don't want to summarize now my written testimony on each of these six criteria but only to comment on a couple of them.

First, I would like to say that the criteria and definitions in S. 611 are clearly an improvement on those that the Branch of Acknowledgment and Research has been using, not a weakening of them. They improve on existing criteria by making them more explicit and better defined, sometimes strengthening them by closing loopholes and giving more detailed definitions and more workable definitions, thus making both the application process and the review process quicker, easier, and fairer, more likely to result in an expeditious decision one way or the other and a decision that will be more just and easier to defend.

The facts involved in the recognition process, both the present one and the one set up by this bill, are anthropological and historical facts. The data and the judgement of anthropologists and historians are required. The criteria are now improved, not loosened or eliminated, to make them more readily evaluated and judged by historians and anthropologists that are called on to do so.

The bill provides a real definition of the crucial concept of "community" which has been lacking in the current procedures. The characteristics that are now set out and the procedures for discovering whether they exist, are anthropologically sound and practical. They define "community." Whether or not a community is Indian is separately specified in this bill. Of course, both of these features are necessary for recognition. But clearly separating the two characteristics—that is whether or not they are a "community", whether or not they are Indian, clearly separating these two—makes the recognition process less dependent on so-called racial criteria rather than more so. Indianess, of course, in a sense is a racial criterion, but recognition of a community is now not racial but rather depends on social and political characteristics. And the new definitions and criteria, by defining community, make it unnecessary to provide in addition evidence that political processes exist. Under the old definition, a community could be a mere aggregate, even an aggregate without social boundaries, so that it was necessary to demonstrate also the existence of political structure and offices, which was often difficult to do given the nature of traditional Indian societies and the spotty documentary record. But with a good explicit definition of a community—as a social group differentiated from its neighbors by a network of social interactions—it becomes unnecessary to prove political processes independently, since any real community necessarily has mechanisms for dealing with problems, for controlling or influencing the behavior of its members, and for differentiating degrees of influence and authority among its members.

I'd also like to comment on the use of the time period in S. 611, of a gap of up to 50 years in the continuity of records that's required. This makes operational the definition in the existing regulations, which says: " 'continuously' means extending from generation to generation." But "generation" here is a metaphor—tribes and groups, as such, don't have generations, of course, only family lines do, and the family generations within a group completely overlap each other. So, substituting for "generation" a "period of up to 50 years" makes it possible to evaluate the real continuity of documentation. It agrees with anthropological and historical experience and practice, 50 years being a period well within the memory at any given date of many members of a group and of many neighbors and outside observers of a group that could be expected to provide documentation.

Finally, I would like to add a brief comment on something not covered in my written testimony; namely, the matter of an appeals panel of qualified anthropologists and historians who would be chosen for temporary service when they were needed. This provides an efficient, relatively inexpensive method for evaluating the anthropological and historical judgments made by the recognition staff. The questions are going to be difficult ones in many cases so it would be useful to have a review by other well-informed experts. It will provide a kind of peer review of determinations of matters of anthropological and historical facts and so, one hopes, would avoid some of the adversarial nature of other mechanisms for appealing administrative decisions.

Thank you.

[Prepared statement of Mr. Sturtevant appears in appendix.]

The CHAIRMAN. Are you suggesting that as long as there is a community of men and women with established system of interaction, it is not necessary to have a formalized political organization?

Mr. STURTEVANT. Yes; in the sense that I believe that any community—given that community is properly defined—necessarily has political processes. It often doesn't have a formal political organization——

The CHAIRMAN. Without the use of recognizable symbols, such as elections of chairmen and——

Mr. **Sturtevant**. Certainly. And I think the legal precedent doesn't require that for an Indian tribe. It merely requires political processes, not a formal structure of offices, elections, and constitution.

The **Chairman**. On the matter of documentation, do you believe that the process contemplated S. 611 as compared to the present process is a realistic one on documentation?

Mr. **Sturtevant**. Do you mean the question of a 50-year gap? I think that 50 years is a reasonable period to chose. There must be some gaps in any historical record, of course, so it is a question of choosing a reasonable period where, if the phenomena of interest existed before and after that gap, one can then assume that they existed during that gap. But 50 years seems to me perfectly reasonable and within general human experience. In any given case, there are plenty of people around who remember what happened 50 years ago.

Mr. **Fogelson**. If I could just remark. We've been talking about 50 years as an absolute date, but it says "up to 50 years" and I think that qualifier is very important.

The **Chairman**. We have, according to the record, 114 petitioning groups at various stages in the process. The BIA has two panels of experts, each panel consisting of an anthropologist, a historian, and a genealogist. How many panels would we need? Obviously, two panels are not enough.

Mr. **Sturtevant**. I think Dr. Campisi is perhaps best of the three of us to answer that.

Mr. **Campisi**. They are doing about a petition and a half each a year. Part of the reason I think that's occurring is that they are not sure how much is enough, so they want everything. So they are interminably slow in making a decision. If you change the regulations and change the definitions as the bill suggests, it requires less of a burden to prove the case. We're at a point now where you need to prove beyond a shadow of a doubt and I think that's the fallacy. If we knew that providing certain documents would carry the question for that point of time, we wouldn't go look for other documents. If they knew that finding that document carries the question, they need not look for other documents. So the process could be speeded up. I would think you would need four or five panels, with the changes, to get any kind of speedy movement on this process.

The **Chairman**. Four or five panels with the changes?

Mr. **Campisi**. A total of either double or triple the number of panels. But without the changes in the definitions, I don't think you'll have much of an impact. You'll just have more people acting somewhat idiosyncratically to the particular case they have. It is the lack of sound guidelines that's causing the problems on both sides. If you submit a petition in 1985 and they don't begin reviewing until 1989, your experts are gone somewhere. When they have the questions, how does the tribe generate the answers? And when they've generated the questions, they go off on something else and then they come back to your petition two years later and the staff of that working group has changed, so that the individual who gave you the question in 1985 is not there in 1989 when you try to answer the question. Somebody is there with a different question.

The **Chairman**. From what you are saying, it is almost a miracle that anyone gets approved.

Mr. **Campisi**. It is. And it is becoming more of a miracle. I think they've raised the standards for fear of being sued. Tribes have raised the amount of materials, they've increased the standards, and we're just going on this kind of roller coaster. Somewhere there has to be something that says, this is enough, on that point you have satisfied us, let's move on to the next point.

Mr. **Fogelson**. I would just like to add something here. I think the provision in both S. 611 and S. 912 of assistance to the petitioning tribes in their research should have some result in leading up to better petitions in the first place, and, hopefully, it may have some effect in speeding up the process.

The **Chairman**. Well, gentlemen, you have been a great help to all of us here. We will consider your words very seriously.

Our last witness is a staff attorney for the Native American Rights Fund, representing the working group, Ms. Faith Roessel; and she will be accompanied by Mr. Jack Trope, staff attorney of the Association on American Indian Affairs in New York; Mr. Allogan Slagle, a lawyer from Concord, CA; Mr. Russel Barsh, a lawyer from the City of Washington; Mr. Michael Mason, of the Native American Program of Oregon Legal Services of Portland; and Ms. Arlinda Locklear, an attorney from Brunswick, MD.

## STATEMENT OF FAITH ROESSEL, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND, WASHINGTON, DC, REPRESENTING WORKING GROUP, ACCOMPANIED BY JACK TROPE, STAFF ATTORNEY, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NEW YORK, NY; ALLOGAN SLAGLE, ESQ., CONCORD, CA; RUSSEL BARSH, ESQ., WASHINGTON, DC; MICHAEL MASON, NATIVE AMERICAN PROGRAM OF OREGON LEGAL SERVICES, PORTLAND, OR; ARLINDA LOCKLEAR, ESQ., BRUNSWICK, MD

Ms. **Roessel**. Mr. Chairman, we're here at your pleasure. I think all of us have worked very hard over the course of the last 6 months preparing this legislation at your request and working very diligently with your staff. We've held several meetings, each of us found that we had different points of view, agreements, disagreements, but essentially what emerged was a consensus amongst ourselves as to how to approach and resolve the problem with petitioning tribes now before the Branch of Acknowledgment and Research.

We can answer questions. I think each of us has our own comments to make given how the hearing has progressed and what issues have come up. I think we're in unanimous agreement that it was never our intent to have the enforcement mechanism that now is in place to be automatic recognition should, as some folks have said, one day elapse and a group would then be automatically recognized. We see there are creative ways to come to some middle ground and possibly a mandamus action into court to force the Branch to move forward on a petition is one viable alternative, but I think that's something that we can all begin discussing.

The **Chairman**. Could you respond to some of the criticism made by witnesses, for example, from Tulalip and others? I would like to get your thoughts on that.

Ms. **Roessel**. I've taken notes. I'll raise one issue and then I'll leave other issues to the people here on the panel. I think one thing that needs to be made clear is that in terms of what you have in the regulations right now. There was testimony given that if someone in the community says that this person is an Indian, then that has to be generally accepted as to proof of their descendency. When you go back to the regulations, it clearly states that you can get affidavits from tribal members to prove descendency. In fact, we've even recommended and S. 611 does change the regulations so you only get an affidavit from a tribal member or the governing body of the tribe, you don't get it from a tribal leader, as is now in the regulations. But that's one issue that needs to be clarified, the fact that as far as oral histories, that is already part of the proof for descendency. It is in the regulations and it is in S. 611.

Ms. **Locklear**. Mr. Chairman, I am Arlinda Locklear.

There is one other area that has been subject to criticism, I think incorrectly, and I think you noted that earlier in some questioning to Chairman Wadena, and that is with respect to the splinter group definition. Some groups have expressed objection to S. 611 on the grounds that it would allow splinter groups to be recognized, suggesting that that's not the case now. The language that appears in S. 611 is verbatim the language that appears in the existing regulations on that issue. That issue has come up in fact, the recognition of splinter groups, in the present administrative process. The San Juan Paiutes are now involved in the petitioning process before the Branch of Acknowledgment and Research. Their petition is being opposed by the Navajo Nation on the grounds that San Juan Paiutes are part of the Navajo Nation. The process is now working its way through that issue and when that petition is finally and formally acted upon by the Department we will have precedent for how that issue is to be dealt with. So to the extent that's a problem, that is a political problem that exists independent of S. 611 and one that is dealt with in S. 611 exactly the way it is in the existing process.

Mr. **Barsh**. Mr. Chairman, I am Russel Barsh. As an attorney for the Samish Indian Tribe, I suppose I should for the record clarify that we have now gone to court to appeal the negative decisions of the Branch of Acknowledgment and Research against us and we have a particular interest in the question of finality, which has been raised by a number of witnesses.

Generally, of course, yes, it is a policy objective to try to achieve finality. But I think in the past, particularly in the matter of Indian affairs, Congress has not strictly followed that general principle in cases where there was evidence of systematic unfairness to Indian people. One very good example of that was the establishment of the Indian Claims Commission. Most tribes in the United States had gone through the Court of Claims in the 1920s under special legislative acts. But there was a feeling later that this really had resolved nothing. The criteria had not been consistent, the court had not been consistent, and no one was satisfied. Therefore, achieving real closure was more important than the mechanical closure of say, well, we've already decided it even though it was unfair. I think that applies here as well. We haven't achieved closure, we've just achieved some decisions.

If I may take a minute more of your time, I think also I have been somewhat concerned by statements made about the constitutional aspects of the policy decisions that are before you. The Constitution generally does require that an administrative agency have specific legislative authority and legislated guidelines. This is an interesting process which has no specific legislated authority and no legislated guidelines at the present time. There was some reference that the criteria applies before and after 1978, some reference to Felix Cohen, who, as Solicitor in the Department, made a number of early decisions on recognition of particular groups. It should be added and emphasized that in 1942, when he prepared the Handbook on Federal Indian Law for the Department, he summarized his work and that of his colleagues in the so-called Cohen criteria. Five points which he stated in the Handbook singly or jointly constituted evidence of recognition, and three of those points are strictly political and legal—treaty relations with the United States, designation as a tribe by an Act of Congress or by an Executive Order, or treatment of by the Federal Government as having collective rights in tribal lands or funds. None of those three of the five so-called Cohen criteria, which as recently as 1976 the Department assured this Committee were the criteria, none of those three appear in the 1978 regulations. There has been a fundamental change and so the treatment of the tribes before and after 1978 has been different.

The most chilling statement I heard today, if I got it correctly in my notes, was a statement by the Department's witness, Ms. Elbert, when she said, "We do not see a treaty as recognition." Then what is the Congress and the Senate for?

Ms. Locklear. If I may add a point on that, what we refer to as the "fast track" system in S. 611. Mr. Chambers spoke earlier about the status of treaty recognition and how important that is as a legal matter to preserve. I agree with what Mr. Chambers said but I would expand it a little bit so that it includes recognition by Congress through any means and not just through treaties. Congress extended recognition to tribes through statute and through other mechanisms and that recognition, it's that status and not necessarily the means whereby the status was given, is what should be preserved and protected by the "fast track" process. There are tribes, for instance, I just came across one about 2 weeks ago from Louisiana, the Gina Band of Choctaws, who were specifically identified and recognized in an appropriation act by Congress and directed by the BIA to service those folks. Those people did receive services for about 5 years from the BIA, principally a school. After about 5 years, however, the local superintendent decided that the particular school teacher was not doing a very good job and he disbanded the Gina Band school. Based on that action, the Gina Band did not receive any further services from the BIA and they are not now federally recognized. As a matter of law, it seems to me, based on that earlier statute, that tribe is federally recognized and it denigrates the value of the status itself for the Department of the Interior to now require that the Gina Band of Choctaw go through the entire process of establishing all seven criteria when Congress itself has spoken to the issue of tribal existence.

The CHAIRMAN. You are suggesting that by the fact that the Congress appropriated monies to be used for that specific purpose, that should suffice as recognition?

Ms. LOCKLEAR. It depends on the terms by which Congress does it, Senator. I think if, as a matter of law, the terms employed by Congress in that appropriation item identify and recognize the tribe as such, that may be sufficient. Where that has taken place, that tribe should be entitled to take advantage of the "fast track" process as well as a treaty signatory tribe.

Ms. ROESSEL. Just one final point that needs to be clarified is the distinction or the point that was made earlier that S. 611 changes the nature or the status of Indian tribes from a political basis to a racial basis. You need to understand that the whole process of going through FAP is to get to the ultimate determination of that political status and to do so requires proof. One proof that is required is descendency, and that is just one of the six criteria that are required under S. 611. The seventh criteria now in the regulations has been excluded so that terminated tribes can go through the process. But by no means do I think any of us here at this table feel that we are taking away Congress' power by now allowing terminated tribes to go through FAP. That is something I think Michael would like to speak to.

Mr. MASON. Mr. Chairman, my name is Michael Mason. I'm an attorney with the Native American Program of Oregon Legal Services. As I think you are aware, more Oregon Indian people were subjected to the termination experiment than in any other state. A lot of our work has been that work of representing tribes in the restoration process and then, subsequent to that, working to reestablish treaty rights, regain reservation lands, and so forth.

I speak today on behalf of the Coquille Indian Tribe, which, as I think you are also aware, is in the process of restoration by the Congress right now. There is a markup scheduled in the House Interior Committee on H.R. 881 and S. 521, the Senate bill, is awaiting consideration by this committee. The Coquille Tribe generally supports S. 611 and only speaks to this issue of should there be particularized congressional treatment of the few remaining terminated tribes. As you are well aware—and your work has been a major part of this, Mr. Chairman—nearly all of the terminated tribes are now restored. The only ones left to our knowledge are the Coquille Indian Tribe in Oregon, the Northern Ponca Tribe in Nebraska, the Catawba Tribe in South Carolina, and the Mixed Blood Utes. And I admit to some confusion about the Mixed Blood Utes' status. As far as the other tribes, from speaking with the Northern Ponca Tribal Council and from speaking with the attorney for the Catawba Tribe, those two tribes, as well as the Coquille, are interested in individualized legislation for their restoration. I think one of the basic reasons for that is that in the restoration process, there is generally a provision made for either a reservation plan to regain reservation lands or an economic self-sufficiency plan, or something to that effect, as a remedial measure to assist the tribe to regain something like the situation it had prior to being put in that legal limbo of termination. We do support S. 611, but ask that the Congress continue in its practice of giving particularized attention to each of the few remaining terminated tribes. I'd be happy to answer any questions about that.

Thank you.

The **CHAIRMAN**. Mr. Chambers made a distinction between ratified treaties and unratified treaties. As all of you are aware, there are many unratified treaties. Indian tribes were not aware that many of these treaties were unratified and on the assumption that these treaties were ratified, ceded large tracts of land. This is the case in California. Should we say in the law that if the treaty is unratified it shall not be recognized as a document?

Mr. **SLAGLE**. Senator Inouye, I'm Allogan Slagle from Concord, CA, and working with tribes in California. It is my understanding that, historically, the interpretation of the California treaties was that the U.S. Senators, in 1852, had the vague impression that California Indians were agreeable to treaty-making in 1851 and 1852; but that, due largely to overwhelming political and economic pressures, California Indian treaties were never ratified and for over 50 years they languished concealed, literally. It was a rather embarrassing fact when they were brought to light again in 1906 and the cover of secrecy was removed from them. No California treaties made during that period ever were ratified. The Hoopa Reservation was established by an Act of April 28, 1864. However, the Senate directed treatymaking to go on with no clear explanation of what their intention actually was. Apparently the distinction between what the Indians thought was a treaty and what the Commissioner and Senate knew was a treaty was not explained to the Indians; and subsequently there has been a series of successful claims brought by Indians of California, finally in consolidated actions, which were allowed by the United States in 1928 and 1946, and there were individual tribes or groups of tribes whose claims were consolidated for those purposes. In applying to be part of the class, individual Indians were asked what treaty their ancestors or their tribe signed. There was certainly an interest in the fact that these tribes had made what they thought in good faith were treaties. Certainly, there was the assumption on the part of the Senate that rather than be annihilated, these Indians would rather cede much of their land and agree to be placed on reservations. There was never adequate preparation made for provision of any lands. In subsequent years, individual and group allotments were set aside for Indians of California, but what remained was a climate of complete confusion. And the idea in the Indians' minds was that there was a trust, there was good faith. I see in this bill an opportunity not to ratify those treaties—that's beyond help—but to try to correct the historical record and correct an historical wrong. I think that makes very good sense, good policy, and I think it's good for the country. It is a part of the moral debt of the Nation. It would contribute greatly I think to a climate of peace in that part of the country.

I salute the committee and you, Senator, for convening the hearings in California. I can tell you now, speaking for the people that I represent there, that the hearing April 28 was an event of great moment for them. It was celebrated ceremonially and carried ceremonially with prayer, and is being carried with prayer now. I will tell you from speaking to some of the elders who testified, regardless of what the conclusion is on Federal acknowledgment, they survived the last Ice Age, they have survived everything else, and they are intending to survive. My fear is that in 50 years, if I live that long, I may be back here to try to make the same argument. My hope is that these tribes will survive everybody in this room and will survive to be an important part of this Nation in future years as allies and as friends of the United States, as they have been and as they are.

The CHAIRMAN. Amen.

Do you have something to add here, sir?

Mr. TROPE. My name is Jack Trope and I am with the Association on American Indian Affairs.

I think that most of the issues that have been raised have been addressed by one witness or another. I'll just add a couple of small points.

One point I'd like to make is that none of the problems that have been raised with the bill appear insurmountable. People have come in and have said that they oppose the bill. When you look at some of the issues that are raised, it is nothing that I believe can't be addressed through the markup process, and we would certainly support the committee's efforts to craft a bill that addresses legitimate concerns that were raised so that we can achieve what we wanted to achieve by drafting this bill, and that is providing a process that is quicker and fairer and better designed to meet its central purpose—determining the legitimacy of tribes that are petitioning through the process.

The only other point I would make is on this issue of political versus racial identity. It seems to me that the arguments in this area have confused the issue a little bit. My understanding of the political rights of tribes is that it is based on sovereignty which pre-existed contact with the European society and in essence that if a tribe continues to exist, then it continues to retain that sovereignty. So by using certain measures that are designed to determine whether or not a tribe continues to exist, you're not turning it into a racial determination, you're simply determining whether that tribe continues to exist and therefore retains the political power it always had. I fail to see why in order to have that political power you have to show that you had a particular type of government at any one time. In fact, for many tribes historically, the internal mechanisms for authority were not formally political. So if the larger society was not dealing with that tribe in a government-to-government relationship because it was not recognizing that tribe, there would have been no intrinsic reason for there to be a formal political structure. So I think when people say that S. 611 goes away from the government-to-government relationship, I really think it doesn't because that's based on notions of inherent sovereignty.

Other than that, I think both our written testimony and other comments that have been made here address most of our concerns.

Thank you.

[Prepared statements of the working group, Mr. Trope, Mr. Slagle, Mr. Mason, and Ms. Locklear appear in appendix.]

The **Chairman**. The discussions we have had this morning and part of this afternoon are obviously very important not only to this Nation but especially to those who wish to be recognized. We have heard witnesses representing varying views.

This may come as a surprise to the staff, but I am going to make the following directive. I am now calling upon the staff director to work together with Mr. Eberhardt to come up with a consensus measure and in the process consult with Mr. Kent Tupper, Mr. Douglas Bell, and Judge Manuel, and the members of the working group. And if I may, I would like to suggest that in 30 days we come forth with a bill that we can once again reexamine. I want to make certain that whatever comes out of this committee is not only acceptable politically in the legislature, but will be one that will recognize and protect the rights of all concerned, for or against.

I would like to thank all of you for your patience in staying here with us all these hours. I would like to stay a little longer but in a few minutes, I have another committee I must chair. With that, I thank you all very much.

This committee is now adjourned.

[Whereupon, at 1:32 p.m., the committee adjourned, to reconvene at the call of the Chair.]

# APPENDIX

## Additional Material Submitted for the Record

## TESTIMONY OF REID PEYTON CHAMBERS

Mr. Chairman and members of the Committee, my name is Reid Peyton Chambers and I am a partner in the law firm of Sonosky, Chambers & Sachse, Suite 1000, 1250 Eye Street, N.W., Washington, D.C. 20005. Our law firm represents a number of Indian tribes and tribal organizations, and has represented clients who sought or are seeking acknowledgement under the current regulations. I am not, however, appearing on behalf of any client. I am responding to the Committee's invitation to discuss S. 611 in light of my experience in private practice and as Associate Solicitor for Indian Affairs with the Interior Department between 1973 and 1976.

First, let me discuss what "recognition" or "acknowledgement" is all about. It establishes what tribes have a government-to-government relationship with the United States. It is a political status, not a racial one. Many Americans have some Indian blood but are not Indians under federal law, because they are not members of federally recognized tribes.

If a tribe is "recognized," it is normally eligible for all federal grants and programs that are provided to Indian tribes and their members. This is an important consequence, because federal funds and support become available to deal with social and economic problems that are often very grievous. But it is very important to bear in mind that this is not the basic purpose or underlying reason to "recognize" a tribe. That

I think these decisions were correct, which is why I opposed resistance to the Stillaguamish and Passamaquoddy positions within the Interior Department. Congress usually legislates generically. It passes legislation concerning "Indians" and "Indian tribes," without enumerating exactly which Indians or which tribes it means. There is no general purpose definition of "Indian" or "Indian tribe" in Federal Indian Law. In administrating statutes involving Indians, the Secretary of Interior and other executive branch officials therefore need to make determinations as to what groups are or are not Indian tribes. Congress could of course make its own determination as to which entities are Indian tribes entitled to a political relationship with the United States. But it has usually not done this, and it seems entirely reasonable and lawful to me for the Secretary of the Interior to establish a process to make that determination, as the Secretary in fact did in 1978.

But there are legal limits on the Secretary's authority. In making those determinations, executive officials can in my view never retract the status established by Congress, as through a ratified treaty. Congress has the ultimate power to decide what Indian tribes will be subject to a government to government relationship with the United States. If a tribe has signed a treaty with the United States ratified by the Senate, or has otherwise been treated by Congress as an Indian tribe, that should conclude the matter. There is nothing more solemn than a treaty. The executive branch has no authority to diminish Indian treaty or congressionally sanctioned rights in any way.

Consequently I support the general concept in Sec. 7(d) of S. 611 which establishes that once a tribe has been treated by Congress as participating in a government to government political relationship with the United States, that relationship continues. The descendants of the treaty signatory should be entitled to maintain tribal relations unless they have clearly and voluntarily abandoned those relations. I think these circumstances present clear situations requiring recognition of the modern day tribes and protection of their treaty and other rights.

There remains what I see as the harder question of how other tribes, which do not have treaties or a history of prior congressional recognition, should be treated. In S. 611, this is presently dealt with in Section 7(c). A number of these tribes were well within the boundaries of the settled colonies at the time of the Constitution. Many of these were and are still treated as tribes by the States where they are located, but not by the United States. I think that is usually an accident of history. Other tribes are remnants of tribes that were forcibly removed west. The claims of these groups to recognition raise important issues of fairness and equality. Many of the tribes are similar to western tribes that have been recognized without question for over a century. Some live in the west, like in California where treaties were made but not ratified and indeed kept secret after gold was discovered.

I have always been uncomfortable with one of the criteria established in the current regulations - the requirement of complete "continuity" in the exercise of tribal political authority. Given the discrimination practiced against Indians throughout much of our history, indeed the forcible discouragement of Indian culture, I think it is perfectly understandable that some tribes went "underground" for fairly long periods, and did not openly declare Indian status. I therefore am attracted by the concept in Section 4(5) of S. 611 that a group which demonstrates tribal status at one point in time and again at a later point in time should be presumed to have functioned "continually" as an Indian tribe if the two points are not too distant.

The bill requires that these two points be within fifty years of each other. Congress clearly has the power to establish such a presumption, even if this changes some case law. The concept is good; I am honestly unsure that fifty years is the correct period. I don't think there is a simple or easy answer to this question. Fairness and equity - the idea that eastern tribes should not be treated differently than tribes with long established relations - must be considered along with the purposes behind recognition or acknowledgement - the general policy of protecting Indian government and culture.

I agree with an implicit premise of S. 611 - that the process followed by the Department since 1978 has been much too slow and cumbersome, whether because it was underfunded or for other reasons. But I think that the Committee should reconsider some of the absolute time deadlines now provided in S. 611. There are other ways to deal with delay and inefficiency, and I am concerned that these time deadlines are so stringent that they represent a solution that is worse than the problem.

I also do not think that the Secretary of the Interior ought to resolve any dispute between the Appeals Panel and the Director. My fear is that this could become a political determination rather than one based upon a record and developed in a scholarly and objective fashion. I would let the Appeals Panel have the final word.

Lastly, I am sure the Committee will give attention to the funding of newly recognized tribes. There is no justification for reducing funds for already strapped Indian tribal governments that are now federally recognized. If a process is set up which likely increases the population served by federal Indian programs, the pie must be correspondingly enlarged. Mr. Chairman, you have taken steps to see that this is done for Indian water projects, and I know you and the Committee will show the same commendable vigilance in this area.

In closing, Mr. Chairman, I commend the Committee for giving attention to this important issue. As I have noted, acknowledgement or recognition is an essential, bedrock determination, a central part of the federal trust responsibility to Native American groups. It ought not be lightly made. Given the delays and well-founded fears of executive termination of congressionally protected rights, I believe that Congress needs to exercise its authority in this area. But I urge the Committee to review carefully the provisions of the proposed legislation, for I believe they could be improved. I have no final answers, but I have tried to set forth the purposes of recognition and some of the critical issues as I see them.

This concludes my statement. Thank you for the invitation to appear before you today. I would be delighted to answer any questions you or members of the Committee may have.

STANLEY G. JONES, SR., CHAIRMAN
TULALIP TRIBES OF WASHINGTON
Before the
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
ON S.611

May 5, 1989

Mr. Chairman and Members of the Committee:

I am Stanley G. Jones, Sr., Chairman of the Tulalip Tribes of Washington. The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish Tribes and other Tribes and bands signatory to the Treaty of Point Elliott.

On behalf of the Tulalip Tribes, I thank the Committee for this opportunity to present this statement regarding the proposed bill, S.611 "to establish administrative procedures to determine the status of certain Indian groups."

We are unconditionally opposed to S.611. Stated in its broadest terms, acknowledgment under S.611 would turn on a group's racial composition rather than on its political and legal relationship with the United States. Its focus is on the identification of individual members of a group as "Indians," not of a group as a "tribal entity." In our view, this bill would permit the creation of Federally-recognized artificial "Indian tribes."

S.611 would also make acknowledgment possible for several groups whose claims have already been denied administratively, judicially, and/or legislatively. Our tribal sovereignty, integrity, and resource base could be seriously damaged and our treaty rights impaired by this and other provisions in this bill. Yet, neither we nor our attorneys were consulted or even contacted by the lawyers who participated in the drafting of this bill. We feel, in all fairness, we deserve the courtesy of, at least, notification when our rights could be so profoundly affected.

This legislation would create a "stacked deck" in favor of certain unrecognized groups the Tulalip Tribes have opposed in their efforts to gain Federal acknowlegement. Some years ago, these same groups failed to establish their validity as Tribes in a Federal District Court. They appealed the decision to the Ninth Circuit Court of Appeals and that Court upheld the ruling that they are not Tribes. The U.S. Supreme Court denied their bid for review. This should have ended the matter of their tribal status, as they certainly would now assert if they had won.

Instead, they then petitioned the Federal Acknowledgment Project for recognition and, one of the groups--the

Samish--has been denied acknowledgment under that process for exactly the same reasons as were given by the Federal Courts. The Samish group asked the Secretary to reconsider the denial and after a full review Secretary Hodel denied reconsideration. Their next (and final) option was to request a judicial review of their petition. They chose not to exercise this option. The FAP also made a proposed finding that the Snohomish group was not a Tribe for exactly the reasons that were given by the Federal Courts. Now we have this bill which proposes to overturn all of those decisions--including the decisions of the Courts.

We would like to point out that the end result of the above mentioned litigation, which was initiated by the Samish, Snohomish and Snoqualmie groups, was a holding that these groups are not Tribes which are successors in interest to the Tribes of the same names which signed the Treaty of Point Elliott. In spite of the negative decisions in the litigation, these groups nonetheless petitioned for Federal recognition as Indian Tribes, again claiming to be political successors in interest to the Tribes of the same names which signed the Point Elliott Treaty.

The Tulalip Tribes have complied with the Treaty that Governor Stevens entered into with us over 125 years ago--the Treaty of Point Elliott--in which the signatory Tribes agreed to move to the reservations created in the Treaty. The Tulalip Tribes, following the lead of our ancestors, have complied with that provision of the Treaty, and from Treaty times onward have resided on our Reservation.

In 1935, as a result of taking advantage of the benefits conferred by the Indian Reorganization Act, which was passed to strengthen and revitalize tribal governments, the Indians residing on the Tulalip Reservation organized into a single tribal government known as the Tulalip Tribes of Washington. The Tulalip Tribes of Washington enjoys Treaty fishing rights under the Treaty of Point Elliott which were adjudicated in United States v. Washington.

Now once again, we find ourselves under assault by descendants of those individuals who did not comply with the Treaty and remove to the Reservation, and who chose to live off the Reservation and abandon their tribal relations.

We are not against Federal recognition for truly sovereign Tribes who have a legitimate claim to Federal recognition. We at Tulalip regard the Federal acknowledgment process very seriously. This bill would substantially revise that process and seriously weaken the criteria for Federal recognition of Indian groups as Tribes and thereby trivialize real tribal sovereignty.

There are many troubling aspects to this proposed bill.

For example, S.611 provides for automatic recognition of petitioning groups in the event of administrative failure to meet certain deadlines established in the bill. This provision strikes us as irresponsible in the extreme.

Groups whose petitions have been previously denied are unlawfully provided multiple additional opportunities for recognition under much more lenient standards. As we noted above, the bill unlawfully provides for administrative reconsideration and overturning of prior Federal Court decisions denying acknowledgment.

Mr. Chairman, these are but a few of the problems that are associated with the provisions of this bill. Attached to my statement is a legal memorandum prepared by our counsel that addresses point-by-point our concerns and objections to S.611.

In conclusion, we would like to point out that when members of the historical Tribes who were signatories to the Treaty of Point Elliott refused to comply with the terms of the Treaty, they forfeited their tribal rights. Now, some 125 years later, they are asking the United States to break its faith with those of us who have complied. Is this to be our thanks for keeping our word?

Thank you, Mr. Chairman.

THE TULALIP TRIBES

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Dawn E. Simpson, *Board Member*
Stan Jones, Jr., *Board Member*
Herman A. Williams, Jr., *Board Member*
Clarence H. Hatch, *Executive Director*

The Tulalip Tribes are the successors
in interest to the Snohomish,
Snoqualmie and Skykomish tribes
and other tribes and bands signatory to
the Treaty of Point Elliott.

# LEGAL STATEMENT

# OF THE

# TULALIP TRIBES OF WASHINGTON

# IN OPPOSITION TO

# S611

BEFORE THE

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

May 5, 1989

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# ERRATA TO
# LEGAL STATEMENT
# OF THE
# TULALIP TRIBES OF WASHINGTON
# IN OPPOSITION TO
# S611

BEFORE THE
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
May 5, 1989

1. On p. 16, the first sentence of footnote #18 should read, "At the taxpayers' expense.".

2. Insert the word "exercises" before "attributes of sovereignty" in the second full paragraph on pp. 19.

3. On p. 21, Mortin v. Mancari should be spelled Morton v. Mancari.

4. On line 10 of p. 24, "treat tribes" should read "treaty tribes".

BELL & INGRAM, P.S.

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Tulalip Tribes of Washington

# LEGAL STATEMENT
# OF THE
# TULALIP TRIBES OF WASHINGTON
# IN OPPOSITION TO
# S611

BEFORE THE
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
May 5, 1989

The Tulalip Tribes of Washington ("Tulalip Tribes") respectfully submit the following Legal Statement in opposition to S611.

## 1.0 Identity of Tulalip Tribes

The Tulalip Tribes are a federally recognized Indian Tribe, organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, occupying and governing the Tulalip Indian Reservation, in the State of Washington. The Tulalip Indian Reservation was reserved and established under the Treaty of Point Elliott (12 Stat. 97). The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish Tribes and other Tribes and bands signatory to the Treaty of Point Elliott.

In Article IV of the January 22, 1855 Treaty of Point Elliott, the signatory Tribes and their members agreed to "remove to and settle upon" the reservation. The Tribes and bands to which the Tulalip Tribes are the successor did so, including the Snohomish and Snoqualmie Tribes, and continue to reside there. The reorganization of the reservation Indians as the Tulalip Tribes of Washington under Section 16 of the Indian Reorganization Act created, in essence, a de facto merger or confederation of these Tribes and bands for whom the Tulalip Indian Reservation was intended and who kept their solemn treaty promise to remove to and settle upon the reservation. One should not be misled by the fact that the name "Tulalip" does not appear in the treaty. The on-reservation Snohomish and Snoqualmie Tribes and other on-reservation Tribes and bands, that merged under the IRA reorganization, adopted the name "Tulalip" from the name of a large bay on the reservation known as Tulalip Bay, and the plural name "Tulalip Tribes of Washington" to signify that the reorganized entity created under the IRA is a confederation of multiple Tribes. Also, the December 23, 1873 Executive Order of President Ulysses S. Grant establishing the reservation referred to it as the "Snohomish or Tulalip Indian Reservation."

## 2.0 The Tulalip Tribes Oppose Enactment of S611

The Tulalip Tribes are outraged by and strongly oppose the enactment of S611.

The general reasons for opposition, which are discussed in more detail below, are:

2.1 S611 would aid, encourage and foster the abuse of continual relitigation of the tribal status claims by groups whose tribal status claims were previously denied judicially and administratively, and by groups Congress has previously said are not Tribes.

2.1.1 S611 denies the Tulalip Tribes due process of law by depriving it of the benefit of its victory in the final Federal Court litigation which determined that the groups the Tulalip Tribes oppose are not Tribes.

2.2 S611 is unconstitutional because it exceeds the power of Congress by arbitrarily emasculating the definition of "Indian Tribe" to include almost any voluntary ethnic association, if at least 75% of its members have at least one drop of Indian blood; and by creating arbitrary procedural deadlines that would require the automatic recognition as sovereign Indian Tribes of any group, whether or not any of its members have any Indian blood, in the event of administrative processing delay.

2.3 S611 creates an unfairly "stacked-deck" against the legitimate interests and concerns of interested recognized Tribes who oppose the trivialization of sovereignty through recognition of purely voluntary associations or "clubs" of Indian descendants. S611 thereby denies due process to interested parties:

2.3.1 S611 creates an unfair and biased decision-making process, replete with arbitrary presumptions eliminating the burdens of proof that groups which are mere voluntary ethnic associations have previously been unable to meet.

2.3.2 S611 would create a biased Appeals Panel of anthropologists sympathetic to the tribal status claims of purely voluntary Indian ethnic associations and authorize them to reopen, "second-guess" and overturn final Federal court decisions on tribal status questions, made by qualified Federal Court judges confirmed with the advice and consent of the Senate, even if all of the parties to those cases are not parties to the administrative action. S611 would also enable the Appeals Panel to reopen, "second-guess" and overturn already final FAP administrative decisions denying recognition.

2.3.3 S611 unfairly constrains and impairs the participation of interested parties in the administrative process and unconstitutionally denies interested parties the right to participate in judicial review of administrative decisions.

2.3.4 S611 would allow "negotiated recognition" behind closed doors without participation by interested parties who are parties to the quasi-judicial FAP proceedings. This denies due process.

2.4 S611 unfairly provides financial assistance to and rewards the continual relitigation efforts of the groups the Tulalip Tribes oppose that breached their treaty promise to come to the reservation, and does not provide any financial assistance to interested parties such as the Tulalip Tribes who kept their treaty promises.

To fully appreciate the extent of the Tulalip Tribes' outrage over and opposition to S611, it is necessary to understand the history of the tribal status claims of the voluntary ethnic groups whose recognition the Tulalip Tribes oppose.

## 3.0 History Of Prior Determinations That the Non-Reservation Voluntary Indian Ethnic Associations The Tulalip Tribes Oppose Are Not Treaty Tribes.

### 3.1 Groups Whose Recognition the Tulalip Tribes Oppose.

Some members of the Snohomish, Snoqualmie and other Tribes and bands signatory to the Treaty of Point Elliott to whom the Tulalip Tribes are successors[1], failed to keep their treaty promise to remove to and settle upon the reservation. Instead, they chose to live in non-Indian communities off-reservation and generally assimilated into and enjoyed the economic benefits of non-Indian society, rather than suffer the on-reservation hardships and repressions experienced by those who honored and kept their solemn treaty promises. Now that a valuable communal treaty fishing right has been vindicated by the Federal Courts, its benefits should be reserved exclusively for the on-reservation Snohomish and Snoqualmie Tribes (now known as the Tulalip Tribes) who kept their treaty promise.\2

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[1] Although not a successor to the Samish Tribe that was a party to the Treaty of Point Elliott, the Tulalip Tribes also oppose recognition of the modern day voluntary ethnic association of Samish because it claims treaty-fishing rights that, if recognized, would diminish the treaty harvest of the Tulalip Tribes and other legitimate treaty Tribes.

---

2. The situation of the off-reservation Snohomish and Snoqualmie ethnic associations is somewhat similar to that of the Eastern band of Cherokee Indians v. United States, 117 U.S. 288 (1866) (the "Cherokee Trust Funds"). There, the Cherokee nation moved to a new territory west of the Mississippi River, pursuant to an agreement reached in a treaty with the United States. Certain monies were paid by the United States into trust for the Cherokee nation. The eastern Cherokee group failed to move with the rest of the nation, but sought the benefits of the trust fund. The Court found that the funds were owned by the nation as a political body, for the benefit of its members. The Court noted that the eastern band must be treated as bound by the treaty if they were to claim under it. "They cannot take its benefits without submitting to its burdens." 117 U.S. at 309. The Court held that since they failed to move with the nation, in accordance with the treaty, they had dissolved their connection with the nation and could not participate in the benefits held by the nation.

The eastern Cherokee group was a "splinter group" that would not be eligible for recognition because the existing FAP regulations and S611 (7)(a)(2) exclude splinter groups. The Snohomish and Snoqualmie groups do not even have "splinter group" status because they didn't break off from the main Tribe as a group and then continue to live together as a Tribe. Instead, they are recently-formed claims organizations whose members came together in modern times for that purpose, but whose ancestors did not live together on historically contiguous basis as even splinter groups, or at all, much less as sovereign Tribes.

Very recently, another impostor calling itself the "Snoqualmoo" appeared on the scene and began asserting land claims on Whidbey Island, and petitioned for Federal acknowledgement in the FAP process, claiming to be the aboriginal Snoqualmie Tribe. The preamble to the group's constitution provides an indication of its modern vintage:

> We, the members of the Snoqualmoo Tribe of Whidbey Island, in order to establish a tribal organization, to exercise those powers possessed by an Indian Tribe and in recognition of our status as a signatory to the Treaty of Point Elliott on January 22, 1855 (12 Stat. 927), do ordain and establish this Constitution pursuant to the Indian Reorganization Act of 1934 (48 Stat. 984) as amended. (emphasis added)

The first voluntary ethnic association of off-reservation

(Continued on next page)

## 3.2 Congress Has Determined That These Groups Are Not Tribes.

In recent times, certain Snohomish and Snoqualmie descendants participated in organizations\3 formed solely for purposes of prosecuting claims against the United States. See, for example, Snohomish Tribe of Indians v. United States, 4 Ind. Cl. Comm. 549 (Docket No. 125) and Snoqualmie Tribe of Indians on its own behalf, and on relation of the Skykomish Tribe of Indians v. United States, 9 Ind. Cl. Comm 25 (Docket No. 93). In these proceedings, these groups asserted that they were the successors in interest to the treaty tribes of the same names. The Indian Claims Commission correctly rejected these claims and instead found that each was only an "identifiable group" within the meaning of Section 10 of the Indian Claims Commission Act, 25 U.S.C. Sec. 70 (i). See 9 Ind. Cl. Comm. 25, 30, 43-44 (Snoqualmie)\4 ; and 4 Ind. Cl. 549 (Snohomish).

The legislation which implemented the Indian Claims Commission awards to the Snohomish group (Docket No. 125) and the Snoqualmie group (Docket No. 93) did so on a descendancy basis, to individuals; not to these groups as tribes. Public Law 92-30, 85 Stat. 83.

In the legislative history of Public Law 92-30, both the House of Representatives (House Report no. 92-148, 92nd Cong., 1st Sess.) and the Senate (Senate Report No. 91-1144, 91st Cong., 2nd Sess.) recognized and found that:

(1) The Snohomish and Snoqualmie groups were merely groups

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(Footnote 2 continued)
Snoqualmie descendants, the "Snoqualmie Tribal Organization" that sought to intervene in United States v. Washington, was not overjoyed by this development and is currently in dispute with the second group. Perhaps they could resolve their differences by establishing separate "lodges" or "chapters" of a single voluntary ethnic association for all off-reservation Snoqualmie descendants that do not belong to the real Snoqualmie Tribe on the Tulalip Indian Reservation.

3. Many of the members of these claims groups were on-reservation Snohomish and Snoqualmie.

4. The Indian Claims Commission also found that the Snoqualmie group was entitled to present claims on behalf of Snoqualmie and Skykomish descendants but that the record failed to establish it was the successor in interest to either aboriginal tribe. See Finding 8, 9 Ind. Cl. Comm. at 30.

of Indian descendants organized solely for claims purposes, not Tribes.

(2) The individual members of these organizations are considered descendants of members of former Tribes, rather than present-day members of successor Tribes.

(3) The membership of these groups is widely scattered throughout the Pacific Northwest and integrated into non-Indian communities, rather than living in distinct Indian communities.

(4) The affairs of these groups has been limited to annual meetings and infrequent special meetings with very small attendance (usually 20-30 persons).\5

3.3 The Federal Courts Have Determined That These Groups Are Not Tribes.

After the valuable reserved treaty-fishing rights of the Tribes that were signatories to the Treaty of Point Elliott (and the other "Stevens Treaties") were vindicated and upheld in the initial United States v. Washington, treaty fishing rights decision, 384 F.Supp. 312 (W.D. Wash., 1974), aff'd 520 F.2d 676 (CA9, 1975), cert. denied, 423 U.S. 1089 (1976),the same Snohomish and Snoqualmie groups that participated in the Indian Claims Commission proceedings reappeared and (together with the Samish group and two other Western Washington non-reservation groups of Indian descendants) attempted to intervene in United States v. Washington, asserting that they were the successors to the Tribes of the same names that were signatories to the Treaty of Point Elliott and were entitled to exercise treaty fishing rights.

The Snohomish and Snoqualmie groups asserted usual and accustomed fishing areas in the same locations as those of the Tulalip Tribes.\6 The claims of the Snohomish and Snoqualmie groups were of extreme importance to the Tulalip Tribes because, inter alia, if allowed they would diminish the treaty harvest share of the true Snohomish and Snoqualmie Tribes (now known as the Tulalip Tribes) who honored their treaty promise to come to

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5. Pertinent portions of the text of House Report 92-148 and Senate Report 91-1144 are set forth at length on Attachment "1" hereto.

6. The Tulalip Tribes' adjudicated usual and accustomed fishing areas are based upon, inter alia, the usual and accustomed areas of the aboriginal Snohomish and Snoqualmie Tribes.

the reservation, and because the prospect of additional sovereigns exercising management authority over and regulating the exercise of the same treaty fishing rights of the Snohomish and Snoqualmie Tribes, which are subject to the management and regulatory authority of the Tulalip Tribes, would create serious management problems and possibly conflicting regulations.

The Tulalip Tribes, the United States and the State of Washington, who were already parties to the case, successfully opposed the intervention of these groups and their claims to tribal status, as well as their claims that they were successors in interest to the Tribes of the same names that were signatories to the Treaty of Point Elliott.

The District Court Judge (Honorable George Boldt) assigned the matter to a Master who, after a full trial and review sustained the position of the United States, the State of Washington and the Tulalip Tribes, and held that these groups were not Tribes.

These groups then appealed to Judge Boldt, who held another full trial and again sustained the position of the United States, the State of Washington and the Tulalip Tribes, finding and holding that (1) these groups have not lived as a continuous separate, distinct and cohesive Indian cultural or political communities; (2) the present members of these groups have no common bond of residence or association other than their voluntary affiliation with the groups; (3) the groups are not entities that descended from any of the Tribes that signed the treaty; (4) the individuals comprising these groups have not maintained an organized tribal structure in a political sense; and that (5) these groups exercise no attributes of sovereignty over their members.\7 These findings were presented and advocated by the United States, and were based upon a voluminous record and a thorough review of their claims.\8

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7. See, United States v. Washington, 476 F.Supp. 1101 (W.D. Wash. 1979).

8. It is hardly surprising that the Court made these findings. There was significant evidence in the case that these groups were assimilated into non-Indian society. The evidence established that they do not occupy any contiguous territory with boundaries of any kind. For example, as to the Snohomish, even their own anthropologist (Dr. Barbara Lane) testified that they do not live in Indian settlements:

> "The off-reservation Snohomish, some of whom traced descent from the Snohomish signers of the Treaty of Point Elliott, do not live in Indian settlements today."

As to the Snoqualmie group, the evidence established that their

(Continued on next page)

These groups then appealed the District Court's decision to the Ninth Circuit Court of Appeals, which sustained the District Court, holding that the groups had not maintained an organized tribal structure and thus could not possess treaty fishing rights. United States v. Washington, 641 F.2d 1368 (CA 9, 1981). Specifically, the Ninth Circuit sustained Judge Boldt's findings that the groups have not functioned as continuous separate, distinct and cohesive Indian cultural or political communities, observing that these groups have not controlled the lives of

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(Footnote 8 continued)
membership is well scattered throughout the State of Washington, with some out of state.

The Court was also apprised of the legislative history discussed above (see, 3.2 above) which expresses the view of Congress that the Snohomish and Snoqualmie groups are not Tribes. Further, the Court was aware that in 1953, the Bureau of Indian Affairs reported to Congress that the Snoqualmie

> "... was not formulated for self-government as members of this band are widely scattered and live in non-Indian communities and are independent and well aware of responsibilities for their own welfare."

See Finding No. 44, 476 F. Supp. at 1108; Ex. U.S.A.-114, p.1.

The evidence in the litigation established that the organization of the Snohomish group was formed in 1948 to pursue claims and that it is not the same organization that was formed in the 1920's that unsuccessfully pursued claims in the Court of Claims. The evidence established that the 1920's group was mostly comprised of on-reservation Snohomish and disbanded when the claim was lost in 1935. Or, as Chairman Clifford Allen of the Snohomish group characterized it in his testimony:

> "It was never kept up".

There was no evidence in the litigation that any of the intervenor groups were united in a leadership or government that significantly affected how any of their members ordered their lives. The groups have no ordinances or any regulations of their members' conduct. The Chairman of the Snohomish group, (Clifford Allen) testified, in response to an inquiry as to whether the group had any power over its members other than to terminate the membership, that:

> "No, I don't believe the Council has the authority to tell them what to do."

their members or exercised the continuous cultural influence required and have not settled in distinctively Indian residential areas.\9

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9. In the United States brief to the Ninth Circuit, the United States represented to the Court:

> "The evidence showed that members of the Intervenor groups had been brought up and presently lived in non-Indian communities. There was no evidence that members of the intervenor group grew up or presently live in a distinctly Indian community. On the contrary, leaders of these groups admitted that they were raised and now made their livings like the non-Indians amongst whom they live. ... Reservation Indians tended to view members of these groups as "liv[ing] like white people"... or as "persons with Indian blood, but not Indians".

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> "Indian governmental control over the lives and activities of group members is practically nonexistent. The evidence showed that the daily lives of the Intervenor group members are not affected by decisions of the group's governing councils. ... The [groups] have asserted no police powers..., have not even exercised their authority to expel members and have generally not taken any action which would affect all group members. (citations omitted) ... In sum, it was clear that the governing bodies of these groups existed chiefly to press the groups' claims against the Government, not to exercise political control over members." (citations omitted)

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> "Witnesses for the recognized Tulalip Tribe, which is made up of Snoqualmie and Snohomish Indians who remained on the designated reservation, painted a sharply contrasting picture of Indian governmental control over their lives. They recounted weekly meetings regarding such tribal activities as clearing land, making roads and cemetaries, and getting doctors and housing. They also described tribal control over disposition of property, and tribal power to enforce ordinances and make arrests. This contrasting evidence highlighted the failure of the five Intervenors to show any political control over members." (citations omitted; emphasis added).

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"Participation in tribal affairs is very limited. The

(Continued on next page)

These groups then filed a Petition for Certiorari to the United States Supreme Court, which denied review. 454 U.S. 1143 (1982).

The final result of this litigation was a holding that these groups are not Tribes, or the successors in interest to the Tribes of the same names which were signatory to the Treaty of Point Elliott.

The litigation over the tribal status of these groups, which was initiated at their instance, took years to resolve. Significant expenditures of time and money were made by the Tulalip Tribes and the United States to successfully oppose their tribal status claims.

The Tulalip Tribes incurred these expenses in good faith, based upon the belief that the judgment of the Federal Courts would be final, be binding upon the parties to the case, and be entitled to be honored and respected.\10

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(Footnote 9 continued)

> primary activity in which these [groups] engage as a group is the annual meeting of members. Yet these meetings are attended only by small minorities of the [group]. This is undoubtedly due in part to the fact that the members of these groups are scattered over wide geographic areas. This dispersion has resulted in their being a small core group which gets involved in group activities and a large group of others who are on the tribal role but have no real contact with the [group]." (citations omitted)

U.S. Brief at pp. 21-22.

10. As these groups surely would now assert if they had prevailed. Generally, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, it puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatsoever. The judgment is a finality as to the claim in controversy, concluding parties not only as to every matter offered to sustain or defeat the claim, but also as to any other admissible matter which might have been offered for that purpose. See, Nevada v. United States, 463 U.S. 110, 129-130 (1983).

The doctrine of collateral estoppel prevents re-litigation in a subsequent action between the same parties (or those in privity with them) of matters which were actually litigated and determined in a prior action. See, Nevada v. United States, supra, 463 U.S. at 130, n. 11; Commission v. Sunnen, 333 U.S. 591, 598 (1948).

These principles directly apply here and bar the relitigation

(Continued on next page)

In other words, the Tulalip Tribes properly thought that the Federal Court's judgment would be the end of the matter.

But it was not.

3.4 The FAP's Refusal to Honor and Respect the Federal Court Decisions.

In the meantime, the Federal Acknowledgement Process (FAP) regulations were promulgated. These same groups who were determined to not be Tribes by the Federal Court decisions which reached the same conclusions as to their lack of tribal status that Congress had previously made,\11 then applied for recognition through the FAP process.

The Tulalip Tribes were appalled at the prospect that these groups who already had "four bites of the apple" at their tribal status claims (before the Master, the District Court Judge, the Ninth Circuit and their effort to obtain the Supreme Court review, might be allowed still "another bite of the apple" in the FAP process.

Hoping that the United States would act consistently with the position it advocated and prevailed upon the the litigation that these groups were not Tribes,\12 and would recognize and honor

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(Footnote 10 continued)
of these groups' tribal status claims.

The importance of the public policy underlying the finality of judicial decisions accorded by the doctrines of res judicata and collateral estoppel has recently been reiterated by the United States Supreme Court in Nevada v. United States, supra:

> ... it ensures 'the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if...conclusiveness did not attend the judgments of such tribunals.' Southern Pacific Railroad v. United States, 168 U.S. 1, 49 (1897)

463 U.S. at 129.

11. See 3.2 above.

12. See 3.3 above.

the binding res judicata and collateral estoppel effect of the determinations made in the litigation upon the parties who actually litigated the tribal status issues, including the United States and the intervenor groups, the Tulalip Tribes requested that FAP address these matters as a threshold question and dismiss the petitions of these groups outright.

Application of the litigation findings and holdings would have been fatal to the FAP petitions of these groups because the litigation determined that they are not Tribes, and because the factual determinations made in the litigation necessarily establish that the groups do not satisfy the criteria in the FAP regulations which require that require that the group has functioned throughout history until the present as an autonomous Indian tribal community (25 C.F.R. Sec. 83.3(d)); that a substantial portion of the group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area (25 C.F.R. Sec. 83.7(b)); and proof that the group has maintained tribal political influence or other authority over its members as an autonomous entity through history until the present (25 C.F.R. Sec. 83.7(c)).\13

3.5 FAP Has Allowed Relitigation Of These Groups' Claims Which Has Led to Additional FAP Determinations That They Are Not Tribes.

Unfortunately, the FAP elected to process the petitions of these groups, rather than deny them outright. As a result, the Tulalip Tribes have been put to tremendous additional expense in again having to oppose the tribal status claims of these groups.

A further result of allowing administrative relitigation of these claims is that significant additional and wasteful Federal expenditures have been made on the FAP process concerning the petitions of these groups and significant FAP staff time has been consumed. These monies and staff time could have been better devoted to processing the petitions of other groups with legitimate tribal-status claims who have not voluntarily gone to court to litigate their tribal status claims, and lost.

Extensive wasteful administrative relitigation in the FAP process has already occurred in the case of the Samish group (one

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13. See, footnote 7 and related text. The Ninth Circuit specifically observed that the evidence in the litigation indicated that these groups have not settled in distinctively Indian residential areas. 641 F.2d at 1374.

of the groups that attempted to intervene in U.S. v. Washington). The preliminary "proposed" FAP finding recommended denial of the Samish petition, based upon the same conclusions reached by the Federal courts that the group is not a Tribe, as did the final FAP decision to deny the Samish group's recognition. The Secretary of the Interior subsequently denied the Samish group's request for reconsideration and the Samish elected not to seek judicial review.

The record created to reach this result was also voluminous. The administrative process took years.

In essence, the Samish were given a fifth "bite of the apple" at the "proposed" FAP finding stage, a sixth "bite of the apple" at the final FAP decision stage, and a seventh "bite of the apple" at the denial of reconsideration stage. The Samish group elected not to take their opportunity for judicial review and have a eighth "bite of the apple".

The same process is starting to repeat itself in the case of the Snohomish group. The preliminary FAP finding is to deny recognition of the Snohomish group based upon the same conclusions as to that group's lack of tribal status which were reached by the Federal Courts in the United States v. Washington litigation, and by Congress in House Report 92-148 and Senate Report 91-1144.

The Snohomish group's petition was filed in 1979. A "proposed" FAP finding to deny the petition was made in March of 1983. Although the FAP regulations require the petitioning group to present evidence to rebut the "proposed" finding within 120 days thereafter, 25 C.F.R. 83.9(g), and then require a final determination within 60 days, a final determination has not yet been made concerning the Snohomish group. They have successfully engaged in a series of delaying tactics and legal maneuvers to avoid a final determination or even the need to respond to and rebut the "proposed" FAP finding within 120 days. These maneuvers required substantial FAP staff time to respond to the Snohomish groups' numerous demands. This has delayed the processing of other petitions.

### 3.6 The Continuing FAP Relitigation Of These Groups' Claims.

Processing of the Snoqualmie group's petition has not commenced.

Unless FAP is required to give Federal Court decisions the binding effect to which they are entitled, the FAP will apparently continue its time consuming grind through the processing of the petitions of the Snohomish and Snoqualmie groups, and further relitigation of their claims, until it reaches the inevitable conclusion already reached by the Congress and the Federal Courts that these groups are not sovereign Indian Tribes. This means that processing of legitimate petitions of other groups will be further delayed. Although S611 is premised, in part, upon concerns about delays in the FAP process, it does not eliminate a major source of delay -- the abuse of continual relitigation\14. Instead, as discussed in more detail below, S611 would allow these groups and the FAP to reopen and administratively overturn the Federal Court decisions and would provide numerous and substantive procedural mechanisms to aid and encourage their abusive practice of continual relitigation of these claims.

## 4.0 The Abuse of Continual Relitigation of Previously Decided Questions Should Be Barred, Not Aided And Encouraged.

### 4.1 The FAP Process Should Honor Prior Federal Court Decisions.

The existing FAP process and S 611 fail to require the Federal Acknowledgement Process (FAP) to honor final judicial decisions of Federal Courts which have previously determined that a petitioning group does not have tribal status or is not the successor of the treaty Tribe it claims to be; or which have made findings that, if made in the FAP process, would be fatal to the group's petition.

The FAP process should be required to address these matters as a "threshold" question and deny recognition of such groups at the outset.

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14. S611's solution to concerns about delay is to impose arbitrarily short administrative processing deadlines which are apparently indicative of a belief that quick decisions are preferable to correct decisions. S611 fails to recognize that the delaying tactics and legal maneuvering of petitioning groups that are the subject of "proposed" FAP findings to deny recognition, and the submission of petitions with obviously serious deficiencies, as well as the improper allowance of continual relitigation of binding Federal Court decisions that they are not Tribes, have caused significant FAP staff time expenditures and have been a significant contribution to the delays and overall "slowness" of the FAP process. These same tactics, if employed under S611, are likely to result in the automatic and arbitrary recognition of groups with no rightful or legitimate claim to sovereign status, because S611 would automatically bestow sovereignty in the event administrative delays cause arbitrary processing deadlines to not be met.

Final Federal Court judicial decisions should be respected and honored, particularly where the United States and the petitioning group were both parties to a case that was extensively litigated on the dispositive issue of tribal status, and where the litigation occurred at the instance of the group in question as a result of its voluntary choice to petition to intervene and assert tribal status claims.

It is grossly unfair that opposing parties such as the Tulalip Tribes, who were put to the expense of such litigation and of opposing the group's tribal status assertions, should be subjected to the further expense of continued relitigation.

The Tulalip Tribes urge Congress to endorse the view that Federal Court decisions must be taken sericusly, and be honored and respected and accorded finality. Federal Court judges, who are confirmed with the advice and consent of the Senate, are well qualified to make, and frequently do make, judicial determinations on disputed federal questions involving Indian issues such as these. Those decisions are entitled to respect and finality.

The Tulalip Tribes encourage Congress to require the FAP process to adopt a similar viewpoint and also honor prior Federal Court decisions.

The abuse of allowing continual relitigation is particularly apparent in the cases of the Snohomish, Snoqualmie and Samish groups.\15

### 4.2 S611 Would Improperly Aid, Encourage And Fund The Abuse Of Continual Relitigation Of Judicial and Administrative Tribal Status Determinations And Allow Federal Court Decisions To Be Administratively Overturned.

Under Section 14(g) of S611, the Samish group (for example) could reopen the prior judicial and FAP denials of its tribal status and reapply to the proposed new Appeals Panel seeking de novo review and recognition based upon the case record in the United States v. Washington litigation\16 thereby having a ninth

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15. See discussion above in Section 3.0.

16. Perhaps the new S611 Appeals Panel could also assist the Federal Courts with their other duties? If the Appeals Panel is authorized to "second guess" and overturn the decisions of Article III Federal Court judges, shouldn't its members appointment be subject to the "advice and consent" of the Senate and have life tenure and other Article III protections? See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

"bite of the apple" concerning their tribal status claims; and, if denied, then seek judicial review, thereby having a tenth "bite of the apple"; and, if denied, then reapply to the Appeals Panel under S611(14)(g) and reopen the prior FAP administrative denial of their petition and re-seek de novo review and recognition based upon that administrative record, thereby having an eleventh "bite of the apple"; and, if denied, then re-seek judicial review, thereby having a twelfth "bite of the apple"; and, if denied, then reapply under the Section 7(d) criteria of S611 and thereby have an thirteenth "bite of the apple"; and, if denied, then re-seek de novo review before the new proposed Appeals Panel and thereby have a fourteenth "bite of the apple"; and, if denied, then re-seek judicial review and thereby have a fifteenth "bite of the apple; and if denied, then reapply under the Section 7(c) criteria (see S 611 (9)(f)), and thereby have a sixteenth "bite of the apple"; and, if denied, then re-seek de novo review before the new proposed Appeals Panel, and thereby have a seventeenth "bite of the apple"; and, if denied, then re-seek judicial review, and thereby have an eighteenth "bite of the apple".\17

Presumably, since S 611 seems to be based upon the premise that nothing is ever final, the Samish group could then either seek to reintervene in United States v. Washington and relitigate its tribal status there, and/or require the entire administrative process outlined above to be repeated over and over again -- ad nauseum, if not ad infinitum.\18

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17. How many strikes until you're out?

18. At the taxpayer's expense, The Samish, Snohomish and Snoqualmie groups have already had the benefit of substantial Federal assistance and staff time devoted to their FAP petitions that should have been denied outright. Further processing of their previously decided claims would be an unwise use of the limited appropriations for the FAP budget. It is also very unfair that S611 (13) provides for further financial assistance to the continual relitigation efforts of these groups, but would not require their members to reimburse the United States or interested parties such as the Tulalip Tribes who oppose their claims, upon denial of their petitions. It is also unfair that S611 does not provide for financial assistance to interested parties such as the Tulalip Tribes, whose members kept their treaty promise to come to the reservation and are the true successors to the Snohomish, Snoqualmie, and other Tribes and Bands that were parties to the Treaty of Point Elliott, and who now must apparently bear the expense of continual relitigation of the same issues with the off-reservation descendants of those who breached their treaty promise.

Contrary to the "findings" of Section 2(4) of S611,
(Continued on next page)

Section 12(f) of S 611 also preserves damage claims against the United States by groups whose petitions for acknowledgement as a Tribe are denied, based upon breach of trust or wrongful withholding of services or benefits to the group as a "Tribe", thereby providing still another opportunity to relitigate "tribal status" claims.

In the view of the Tulalip Tribes, this abuse of continual relitigation is entirely unjust and unfair and to opposing parties such as the Tulalip Tribes who, in good faith expended its scarce resources to fully litigate the tribal status issues concerning these groups in the United States v. Washington litigation.

## 5.0 S611 Would Trivialize Tribal Sovereignty By Emasculating The Definition of "Indian Tribe" To Allow Recognition Of Voluntary Indian Ethnic Associations.

### 5.1 Recognition of Tribal "Sovereignty" Is A Serious Matter With Serious Consequences.

Recognition of an Indian group as a sovereign Indian Tribe means that the group is a distinct, independent political community, qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reasons of the group's original tribal sovereignty. F. Cohen, Handbook of Federal Indian Law (1982 ed.) (hereinafter Cohen"), 232. It also means that the United States has a fiduciary, trust relationship (Cohen, 220-21, 232) and a government-to-government relationship with the group.

Except to the extent tribal powers of self-government are limited by federal statutes or treaties or the restraints implicit in the protectorate relationship with the United States,

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(Footnote 18 continued)
"inadequate financial resources for research by petitioners" should not be a problem for groups with legitimate claims to tribal status and sovereignty who should be able to readily document their existence from their own records and already existing histories of the territories they continue to occupy.

"Inadequate financial resources for research" is only a problem for groups of recent historical vintage, such as the Snohomish, Snoqualmie and Samish whose preposterous claims to continual historical existence allegedly warrants a perpetual and costly search at federal expense for a needle in a haystack that's just not there.

tribes remain, in all other respects, independent, self-governing political communities. Cohen, 235.

The powers of Tribes as sovereigns extend over both their members and their territory, United States v. Mazurie, 419 U.S. 544, 557 (1975); Cohen, 246. Tribes have the power to enact and enforce substantive criminal and civil laws concerning their members and internal matters, Cohen, 248; and, in many instances, civil laws concerning non-Indians. Cohen, 246, 252-257. Tribal enactments may preempt otherwise applicable state law. Cohen, 249. A Tribe's legislative power includes the power to levy taxes that, in many instances, may apply to both members and non-Indians. Cohen, 250. Tribes also have broad powers to regulate land use and impose zoning controls. Id. Tribes may establish and operate their own court systems. Cohen, 250-252, 332-348.

Recognition also entitles a group to the full array of benefits that flow from its government-to-government relationship with the United States, including all of the special programs and services and economic benefits that flow therefrom.

The importance of a decision that a group is a sovereign entity cannot be over-emphasized. Diluting and emasculating the definition of "Indian Tribe" only serves to trivialize tribal sovereignty and will diminish the respect and dignity to which real sovereign Tribes are entitled.

### 5.2 "Indian Tribe" Has A Time-Honored Legal Definition.

In Montoya v. United States, 180 U.S. 261, 266, (1901), the Supreme Court defined the term "tribe":

> "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory...".

Tribes are "distinctly Indian communities", United States v. Sandoval, 231 U.S. 28, 46 (1913). They are a "people distinct from others". The Kansas Indians, 72 U.S. (5 Wall) 737, 755-56 (1867).

An Indian Tribe must be something more than a private voluntary organization. United States v. Mazurie, 419 U.S. 544, 557 (1975). In Mazurie, the court reviewed other decisions regarding the attributes of Tribes:

> "... Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, Worcestor v. Georgia, 6 Pet. 515,

557, 8 L.Ed. 483 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations..." United States v. Kagama, 118 U.S. 375, 381-82... (1886); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 173... (1973)."

These definitions establish legal minimum standards a group must meet, and must have met on an historically continuous basis, to constitute sovereign Indian Tribes:

(1) They must have a specific territory to govern.

(2) They must inhabit that territory.

(3) Their members must be Indians.

(4) Their members must be united in a distinct Indian community so as to be a people distinct from others.

(5) Such community must exist under one leadership or government -- i.e., have an organized tribal structure in a political sense that has exercised attributes of sovereignty and political influence over its members.

(6) The group must more than a voluntary, private ethnic association.

The Tulalip Tribes respectfully submit that these legal minimum standards require a "Tribe" to be a geographically, socially and politically distinct and cohesive Indian territorial community, recognizable as such to outsiders, that inhabits a specific territory, and attributes of sovereignty over its members and in the governance of that territory.

The tests applied by the Federal Courts to the tribal status claims of the groups that attempted to intervene in U.S. v. Washington, (see, Section 3.3 above) conform to these requirements; as do portions of the existing FAP criteria which require a showing that a group has, on a substantially continuous basis throughout history until the present (25 CFR Sec. 83.3(a)) been an identifiable and identified Indian group (25 CFR 83.7(a)), inhabiting a specific area or living in a community viewed as Indian and distinct from other populations in the area--i.e., a territorial community recognizably distinct to outsiders (25 CFR 83.7(b)).

S611 would allow recognition of groups that do not meet these minimum standards and are mere voluntary, private ethnic associations. See Section 5.3 below.

5.3 S611's Relaxed Criteria Do Not Meet The Legal Minimum

Standards Established By The Time-Honored Legal Definition of "Indian Tribe".

5.3.1 The "Automatic Recognition By Administrative Delay" Provisions Of S611 Would Require Recognition Of Groups That Do Not Meet The Legal Minimum Standards To Constitute Indian Tribes, And Who May Not Have Any Indian Membership.

If the Washington Redskins football team sought federal acknowledgement, they would be automatically bestowed with sovereignty as a federally recognized Indian Tribe "on the day after [the] date" the Director failed to meet the administrative processing deadlines of S611. See S611 8(i), 9(g), and 10(d).\19

The Tulalip Tribes fail to see the logic or wisdom of these provisions or their underlying premises that quick decisions are preferable to correct decisions, and that the legitimate objections and concerns of interested parties such as the Tulalip Tribes should be ignored simply because of a federal administrative delay.\20 This result, in a quasi-judicial

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19. Why not, instead, just put the names of all organized groups in the United States into a hat, and pick "Tribes" at random?

20. That very likely could result from the administrative backlogs created by the abusive continual relitigation and other delaying tactics and legal maneuvers of certain petitioning groups (See 3.5 above) whose efforts, under S611, would be rewarded with sovereignty.

The transitional provisions of section 14 do not resolve concerns about the possibility of untimely actions since a significant number of petitions can be submitted and/or transferred from the existing process simultaneously thereby creating an incredible administrative burden that also would prevent timely action and lead to automatic recognition.

Section 15 provides appropriations for carrying out S611 in the sum of $3,000,000.00 each year for 1990, 1991 and 1992 and $2,000,000.00 for each of the following three years. The original draft of the bill provided for $4,000,000.00 in 1990 and 1991. It would appear that the authors of the final version of S611 did not choose to provide these additional monies, or include provisions for emergency funds in the event shortages occur, even though the consequence of funding shortages under S611 will be automatic recognition of petitioning groups if such shortages cause or contribute to statutory deadlines not being met.

context, would violate the due process rights of interested parties and that oppose recognition. This result would also be a breach of the United States trust responsibility to the Tulalip Tribes if it allowed the automatic recognition of the non-reservation Snohomish and Snoqualmie groups who breached their treaty promise to come to the reservation.

5.3.2 The Section 7(c) Criteria Would Allow Recognition of Groups That Do Not Meet The Legal Minimum Standards To Constitute Indian Tribes.

5.3.2.1 Section 7(c)(1) only requires historically continuous identification of a group or its members "as Indians"--not as a Tribe. This effectively eliminates any requirement that the group has existed and been distinctly recognizable and identified historically as a Tribe by outsiders.

The issue has never been whether the members of these groups are "Indians." The question is whether their groups are sovereign Tribes, rather than mere voluntary, private, ethnic associations. S611 (7)(c)(1) would transform the question of the group's sovereign political status into an issue of its members' racial composition. The real question remains to be the group's political (government-to-government) relationship with the United States, which is a "political" rather than a "racial" relationship. Mortin v. Mancari, 417 U.S. 535 (1974).

Section 7(c)(1) provides that its test is conclusively demonstrated by documentation of identification by federal officials of the petitioner as Indians for the period of such identification. This presents the serious danger that responding correspondence from federal officials addressed to a group by its chosen name will be found to constitute such documentation, an illusion that has been frequently asserted by petitioning groups in the past.

Absent such documentation, the criterion may be met by proof of identification "as Indians" in courthouse, church, or school records, newspapers or books, by anthropologists, historians, or other scholars, or by national Indian organizations, despite the fact that the authors of such documentation may not have had the foggiest idea that they were addressing tribal status questions or that their particular choice of words might later be construed to bestow sovereignty.

5.3.2.2 Section 7(c)(2). The requirement of Section 7(c)(2), that a substantial portion of the members form a "community" is weakened by S611's relaxed anthropological definition of "community" (a network of social interaction) and its proviso that the existence of a "community" be determined by methods customarily employed by social scientists, i.e. anthropologists who are naturally inclined to think in terms of the general anthropological view of a "community" as any group with "a network of social interaction," rather than in terms of the time-honored legal minimum standards for an Indian Tribe--i.e., a geographically, socially and politically distinct and cohesive Indian community, recognizable as such to outsiders, that inhabits a specific territory, and exercises attributes of sovereignty over its members and in the governance of that territory.

These problems with the relaxed definition of "community" in Section 4(4) are not eliminated by the additional language of the definition: "with due regard\21 to the size, geographic proximity, relative isolation, and institutional character of the group". Contrary to the avowed purpose of Section 3(3), this language does not establish "clear and consistent standards" which will "insure equal treatment for all Indian Tribes". The language does quite the opposite and creates a vague test which, notwithstanding the "splinter group" disclaimer of Section 7(a)(2), provides the opportunity (and, in the case of an intentionally or unintentionally biased decision maker, the broad latitude) for recognition of groups that are not a geographically, socially and politically distinct Indian territorial communities, recognizable as such to outsiders, and which exercise attributes of sovereignty over their members and their territory; but, instead, voluntary groups of Indian descendants whose members may be scattered far and wide and keep in touch and interact principally by mail or telephone; or only as a social organization.

S611 does not require a petitioner to have or govern any territory. Section 4(11) refers to "the tribal property interests, if any, of the petitioner", and refers to "the State...in which the principal office...of the petitioner [is] located". Presumably, a petitioner may be like the legal fiction of a corporation that is not located and does not exist anywhere, but has a "principal office" and members who have a "network of social interaction" via mail or telephone contact among themselves (even if they live at a great distance from one another) and who have a list of members and therefore the ability to "differential members from non-members". Such a group would be able to meet the relaxed definition of "community" in S611 and be entitled to recognition. There is no distinction, under the definition of "community" urged, between such a group and any other voluntary ethnic association (such as the Sons of Norway), except the Indian descendancy of the members. Section 7(c)(4) of

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21. How much "regard" is "due"?

S611 blurs even this distinction by requiring that only 75% of the group's members be Indian descendants. S611(9)(f) authorizes the Director to waive even this "requirement."

Section 7(c)(2) also states that its "community" criterion is conclusively demonstrated by evidence that a substantial portion of the group's members have continually resided in a specific geographical area without making such residency a mandatory requirement, and without imposing a requirement that the group have constituted a geographically distinct and recognizable Indian territorial community. This is true even if the group's members have no network of social interaction whatsoever, much less the type of body politic that a "citizenry" comprise which is governed by a sovereign.

5.3.2.3 Section 7(c)(3) weakens the legal requirement of historically continuous tribal sovereign political influence over members by providing that "some other form of authority" will also suffice--i.e., something other than the exercise of attributes of sovereignty over members. Presumably any organization or club of Indian descendants could meet this test by including in their bylaws any form of authority over members, such as the power to expel. This would allow the Snohomish group, for example, to satisfy S611(7)(c)(3) even though they exercise no attributes of sovereign political influence over members. See, footnotes 7, 8 and 9.

Section 7(c)(3) also provides that its criterion may be demonstrated as to any particular point in time by showing that the group constituted a "community"--i.e. by merely showing that the group had a "network of social interaction", without any showing that such interaction reflects the special and unique kind of "political" influence a true sovereign exercises over its citizens.

5.3.2.4 Arbitrary Presumption of Continuity. The definition of the term "continual" in Section 4(5) would also significantly ease a petitioner's burden of demonstrating historical continuity within the meaning of the Section 7(c) criteria. The term "continual" is defined as extending from historical times to present essentially without interruption; but the definition states that if a group demonstrates a fact or status at one point in time and at another point not more that 50 years later, continuity shall be presumed during the intervening period absent proof to the contrary.\22

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22. Maybe they were hiding for 49 years at a time and the historians simply could not find them? Even at present, one could search the entire State of Washington for a recognizable group of Snohomish and Snoqualmie Indians living as a tribe in a specific area and governing territory, and find none--except on (Continued on next page)

The definition removes most if not all of the burden of proof that the groups the Tulalip Tribes oppose have previously been unable to sustain. The Snohomish, for example, were unable to document their alleged existence for significant portions of their history. Instead, they asserted that they were the successors of the Snohomish group that participated in the 1920's claims activities, and argued before the Ninth Circuit for a presumption of continued existence. The Ninth Circuit quite properly rejected any such presumption of continued existence simply because the members' ancestors belonged to treat tribes, and recognized that such a presumption begs the question by noting that "the [groups] have not proved that they are the tribes that existed at treaty times so as to benefit from a presumption of continuing existence." United States v. Washington, 641 F 2d. at 1374.

Such a presumption would put an impossible burden of rebuttal on interested parties who oppose recognition. How could the non-existence of a group for 49 years be shown except by pointing to the absence of proof of existence?

Any group can adopt the name of an earlier organization that existed within the last 50 years. Under the presumption of continuity in Section (4)(5), that would be all that is required to show a group's historically continuous existence. This allows an illusion not unlike that perpetrated

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(Footnote 22 continued)
the Tulalip Indian Reservation.

Of course, the off-reservation Snohomish and Snoqualmie ethnic associations and their anthropologists (who see a "Tribe" behind every bush) will say that their "Tribe" lives on in their hearts and minds. It's just not visible to anyone else. Or, as Kathleen Bishop (a now-deceased member of the Snohomish group) testified on cross-examination in the United States v. Washington tribal status proceedings (See 3.3 above):

> "Just because the Snohomish people are scattered all over hell and gone does not mean we care less, my dear."

See United States v. Washington, October 29, 1975 Transcript, at pp. 332.

Unfortunately, "trial" by the S611 Appeals Panel or the Negotiated Recognition Process would not have the benefit of such cross-examination or input, since it would occur behind closed doors. See, S611, Sections 6(c) and 12(a).

by certain petitioning groups who argue that responding correspondence addressing them by their chosen name proves that they are the Tribe they claim to be.\23

5.3.2.5 The relaxed and bizarre criteria of Section 7(c) would improperly facilitate and allow the recognition of groups that do not have any attributes of true sovereignty and meet none of the minimum standards of the time-honored legal definition of "tribes"--sovereigns without a territory, artificial "instant tribes" with 75% of their members having at least one drop of Indian blood each (unless the Director waives that requirement), but who live in no specific, recognizable geographic community and who may have little or no interaction (social or political) or connection except their voluntary association with an ethnic group that achieved recognition under S611.

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23. This means that a group like the Snohomish could prove continuity in this century by pointing to the 1920's claims organization of the same name (which consisted principally of Snohomish descendants who kept their treaty promise and lived on the Tulalip Indian Reservation), and then claiming that the present Snohomish group, which organized and incorporated in the 1950's to prosecute claims before the Indian Claims Commission, is a continuation of the 1920's organization which has continuously existed since that time, even though the Snohomish Chairman Clifford Allen testified in the United States v. Washington litigation that the 1920's organization "was never kept up". See footnotes 8 and 22 above.

The confusion caused by different groups having the same name in different historical periods is illustrated by the "Snohomish". The "Snohomish Tribe of Indians" that presented Duwamish, et al v. United States, 79 Ct. Cls. 530 (1934), see, footnote 27 below, was a non-profit corporation formed in 1927 under Washington State law which was formed for claims purposes and as a social organization (see, Exhibit "1" to Attachment "2"). It had both on-reservation and off-reservation Snohomish as descendants. Simultaneously with the Snohomish corporation's claims efforts, the Tulalip Indian Agency of the Department of the Interior continued to recognize that the Snohomish Tribe itself was on the Tulalip Indian Reservation. See, for example, Exhibit "2" to Attachment "2" (Snohomish Tribe resided on-reservation in 1929); and Exhibit "3" to Attachment "2" (Snohomish Tribe resided on-reservation in 1936).

It can thus be seen that a name alone does not, in reality, make a sovereign or prove its historically continuous existence--except under the arbitrary presumption of S611.

5.3.3 The Section 7(d) Criteria Would Allow Recognition Of Groups That Do Not Meet The Legal Minimum Standards to Constitute Indian Tribes.

5.3.3.1 Section 7(d)(1)(A) provides that 15% of the members of a Section 7(d) "Tribe" need not be Indians, and the remaining 85% need only be descendants of members of the historic Tribe, no matter how few in number or how low their blood quantum (e.g. a single drop of Indian blood each). S611(9)(f) also authorizes the Director to waive this requirement.

This bizarre criteria for tribal status may be conclusively proven if the members are listed on an "official roll", as defined in Section 4(9), which apparently would include any Federal census, even though the assignment of race in a Federal census has historically been based upon the observation of the census taker, or unverified information provided by the person polled, not upon genealogical proof; and judgment distribution and land allotment lists, even though such lists were not intended, at the time of their preparation, to designate current membership in a Tribe.\24

The ancestry requirement of Section 7(d)(1)(A) may also be met by an affidavit from the petitioning group, which may thereby prove its own existence. The ancestry requirement may also be met by various government, church or school records, even though the authors of such documentation may not have had the foggiest idea that they were addressing tribal status questions or that their particular choice of words might later be construed to bestow sovereignty; and may not have in any way verified or substantiated the accuracy of their entries.

5.3.3.2 Section 7(d)(1)(B) requires proof that a petitioner's membership is composed principally of persons who are not enrolled members of any other Indian tribe. As apparently intended, this should be easy enough to establish for the 15% of a Section 7(d) "Tribes" membership who are not required to be Indians, and for the remaining 85% who may be on

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24. To the contrary, the judgment distribution rolls for the Indian Claims Commission awards, for example, were intended merely to indicate descendancy (the basis upon which Public Law 92-30 required distribution to be made) because Congress recognized that many of the members of the organizations which prosecuted such claims were "descendants of members of former tribes, rather than present-day members of successor tribes". See 3.2 above.

an "official roll" as a result of some Indian blood entitling them to a descendancy distribution under a claims distribution statute such as Public Law 92-30. See, footnote 24 and section 3.2 above.

5.3.3.3 Section 7(d)(1)(C)(i) allows a petitioner to prove it is a successor to a party to a treaty by claiming to be the same Indian group the United States Claims Court found to be such a successor, even though an interested party (such as the Tulalip Tribes) who are the true successors were not parties to the case and had no notice or opportunity to be heard or to contest such determination,\25 and even though the fact that the present group bears the same name does not prove it was the Tribe that was a party to the treaty\26 or a continuation of the same organization that participated in the Federal Court litigation.\27

Section 7(d)(C)(i) also allows a petitioner to prove it is the successor to a treaty tribe by claiming to be the same group found to be a successor by the Indian Claims Commission, even though interested parties such as the Tulalip Tribes were not parties and had no opportunity to contest such determinations, and even though the Federal Courts and the United States have recognized that claims before the Indian Claims Commission involved compensation for individuals, and tribal

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25. E.g. Snoqualmie Tribe of Indians v. United States 372 F. 2d 951 (Ct. Cl. 1967) which was prosecuted by the same Snoqualmie Tribal Organization which Congress found was merely a recent claims organization that was not a successor in interest to the Snoqualmie Tribe that was a party to the treaty (See 3.2 above), a fact they apparently and conveniently failed to call to the attention of the Court, as well as the fact that another party (the Tulalip Tribes) that was not before the Court disputed their contentions of tribal status and is the real successor to the Snoqualmie Tribe. Surely this wouldn't happen again if a S611 petitioner were the only party to the record under S611 (12)(c) in any judicial review?

26. See, 5.3.2.4 above and footnote 23.

27. See, 5.3.2.4 above and footnote 23. In Duwamish, et. al. v. United States, 79 Ct. Cls. 530 (1934), the Court found that the Snohomish and Snoqualmie plaintiffs were parties to the Treaty of Point Elliott, but this does not in any way prove that the current petitioning groups were such plaintiffs. Congress has already found that they are not. See, 3.2 above.

status issues and determinations were not necessary for the Commission to make or binding.\28

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28. The Ninth Circuit so held in rejecting the claims of the Snohomish, Snoqualmie and other groups who attempted to intervene (see, 3.3 above) that the Indian Claims Commission decisions were determinative of tribal status questions. United States v. Washington, 641 F. 2d at 1374. In its brief to the Ninth Circuit, the United States stated:

> "...The Indian Claims Commission did not attempt to determine whether these groups were tribal entities in the sense of being political bodies which can presently exercise treaty fishing rights. Indeed, the limited mandate of the Commission would not have given it jurisdiction to consider this question, as it is not related to a claim against the United States. See 25 U.S.C. 70a. As the issues are entirely different from the compensation issues considered in the claims cases, collateral estoppel cannot apply. In general, it is inappropriate to lift any particular language from a claims case and apply it to a case determining present tribal existence and rights. The focus of claims cases is compensating persons who are descended from tribes which were the victims of unfair dealings. 25 U.S.C. 70a. A claim "may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members ***." 25 U.S.C. 70i. As stated by the Court of Claims in Thompson v. United States, 122 Ct. Cl. 348, 357 (1952):
>
>> In our opinion that section [25 U.S.C. 70i] permits a representative action on behalf of one or more tribes, bands or communities, which may have ceased to exist such as tribes or bands, if the individual members or the members of the group can be identified as members or descendants of members of a band or tribe previously existing.
>
> Given these broad standards, the present viability of a tribe was not a question before the Commission or Court of Claims.
>
> ***

When Congress provided for the disposition of funds in payment of Indian Claims Commission awards to the Snohomish and Snoqualmie tribes, it made clear that it did not consider the organizations bring the claims to be political successors to the

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*Section 7(d)(1)(C)(iii)* allows a petitioner to prove tribal status by proving that there is *any* land or property (even personal property, including money) held in trust by the United States for the petitioner or its members, or subject to restraints on alienation imposed by Federal law. This is appalling since the fact of a trust acquisition or imposition of a restraint on alienation is not intended to constitute a determination of tribal status. For example, under 25 CFR 151.3, the United States may acquire land in trust for individual Indians; or, under the definition of "Tribe" in 25 CFR 151.2(b), for Indian Tribes, or Indian *bands*, or Indian *communities*, or *any other group of Indians*. As another example, the General Allotment Act imposes restraints on alienation without intending to thereby make tribal status determinations. Under this bizarre test, any group of at least 85% Indian descendants with trust or restricted status land are entitled to recognition.

The bizarre test of Section 7(d)(1)(C)(iv) would allow any group with 85% Indian descendants (or less if the Director waives the 85% requirement) to be recognized if the group was the subject of a Federal statute that compensated or confirmed a claim of the petitioner to an interest in land. This

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(Footnote 28 continued)
*treaty tribes.* *H.R. Rep. No. 92-148*, 92nd Cong., 1st Sess. 2 (1971). As an Interior Department report accompanying the legislation explained:

> These organizations have not been recognized by the Federal Government as tribal entities. They have, however, been recognized for the purposes of prosecuting their land claims against the United States. ***
>
> The individual members of these organizations are considered descendants of members of former tribes rather than present-day members of successors tribes. [*Id.* at 4]

*Awards to all of the intervenor groups have not gone to the modern organizations themselves but to the individual descendants of the tribes as they existed in the 1850's, on a per capita basis.* Findings of fact No. 15, 24, 33, 42, 53, 476 F. Supp. 1105-1109. *These actions under the Indian Claims Commission Act therefore rebut, rather than support, intervenors' claims to be political successors to the treaty tribes.*"

United States Brief at pp. 28-30. (part of emphasis added; part in original).

is exactly what Public Law 92-30 did with respect to the Snohomish and Snoqualmie Indian Claims Commission awards, although its legislative history made it very clear that Congress found that these groups are not Tribes. See, 3.2 above.

5.3.3.4 Section 7(d)(2) establishes an unfair and arbitrary presumption that any group which satisfies the relaxed and bizarre criteria of Section 7(d)(1), was previously acknowledged as as "Tribe," and must now be acknowledged. The Director may rebut this presumption only by documentary evidence which either (i) contradicts all, or substantially all, of the groups evidence,\29 or (ii) demonstrates that the petitioner permanently abandoned tribal relations,\30 or fails to constitute a contemporary community.\31 Apparently the drafters of S611 were not satisfied with the impossibility of the Director's rebuttal burdens since S611 7(d)(2)(B) provides the petitioner an opportunity to respond to the Director's documentary rebuttal evidence.\32

5.3.3.5 If the criteria of Section 7(d) are met, a group is entitled to recognition without any proof of historically continuous existence as a geographically, socially, and politically distinct Indian community, recognizable as such to outsiders,, that inhabits a specific territory and exercises attributes of sovereignty over its members and in the governance of that territory. The off-reservation Snohomish and Snoqualmie groups that Congress has said are not Tribes probably meet these Section 7(d) tests, due to the fact that the names of their Indian members appear in claims distribution descendancy lists and their members may own trust or restricted land.

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29. In other words, the Director must produce documents which show that the 15% non-Indian portion of a groups members really are Indian descendants and that the remaining 85% really are not; and that all of the members really are enrolled in another Tribe; and that the trust or restricted land of the group or its members does not really enjoy such status; and that the members names really aren't shown on a descendency distribution list for a claims award.

30. With itself? Which it never had?

31. Even if it didn't before contemporary times? How is it possible to prove that members of an existing organization have no network of social interaction?

32. S611 does not afford interested parties any opportunity to participate in the impossible task of rebutting the presumption.

5.4 S611 Would Allow "Negotiated Recognition" Behind Closed Doors Without Participation By Interested Parties.

5.4.1 Section 8(f) provides that if a preliminary ruling denies acknowledgment, the petitioner may request "cooperative reconciliation" under Section 12 which establishes a procedure for the group and the acknowledgment staff to interface in an informal and non-adversarial manner and seek agreement on interpretation of evidence or disputed issues. Section 12 also provides that the Director may reverse the preliminary adverse ruling if such "cooperative reconciliation" resolves the issues and states that such reversal shall constitute final agency action.

5.4.2 This creates the dangerous potential for a "negotiated recognition". There is no provision allowing interested party participation in the negotiations or comment upon or administrative appeal of the Director's reversal of a preliminary adverse ruling through the negotiated recognition.

5.4.3 Additionally, S611 (8)(g) provides that preliminary rulings which become final are not subject to judicial review. This would include a preliminary ruling which is reversed and become final through the negotiated recognition process that provides no opportunity for input or challenge by interested parties and would bar an interested party from challenging a "negotiated recognition".

5.4.4 S611 (12)(c) also provided that "For purposes of judicial review, the petitioner shall be considered to be the only party of record". This means that an interested party such as the Tulalip Tribes as well as the United States\33 would not be entitled to participate in any litigation by a petitioning group to challenge its denial of recognition; and that interested parties could not seek judicial review to challenge a negotiated or other recognition decision.

5.4.5 Allowing a negotiated resolution of a contested quasi-judicial proceeding that occurs behind closed doors, and excluding interested parties who oppose recognition from any participation, opportunity to comment, or opportunity to seek judicial review, is a gross denial of the due process rights of interested parties, as is the exclusion of interested parties from participation in any judicial review sought by petitioners.

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33. Shouldn't the other parties to the quasi-judicial administrative proceeding at least be allowed to stop by and wish the court well?

Presumably, these provisions are not among those which the drafters of S611 intended ensure "that all Indian Tribes are accorded equal treatment". See, S611 (3)(3).

## 6.0 S611 Creates An Unfairly "Stacked Deck" Against The Legitimate Interests And Concerns Of Interested Parties--A One-Sided And Biased Process That Would Bestow Sovereignty Upon Private, Voluntary Ethnic Associations That Otherwise Would Not Have A Prayer Of Being Recognized.

The "purposes" of S611 are cast in the form of noble goals, such as establishing just, clear and consistent standards to ensure equal treatment of all Indian Tribes. There is no apparent reason, however, why this cannot occur within the existing FAP process, or that is it not occurring. There are no cases indicating that the existing FAP criteria or regulations have been applied inconsistently, or in a manner which has denied equal treatment or due process to any petitioner.\34 Even if

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34. Contrary to the finding of Section 2(4) that there has been "a failure to fully protect a petitioner's right to due process and objective administrative review and appeal" in the existing FAP process, the existing FAP staff has bent over backwards to accommodate the due process rights and objective review rights of petitioners. Also, processing the petitions of groups that have been judicially determined to not constitute Tribes, instead of outright denial, accords more process than they were due.

The FAP staff has also gone to great lengths to document and footnote proposed findings at petitioner's requests to assist their rebuttal efforts. FAP staff has also met informally with these groups to hear their cases, although interested parties such as the Tulalip Tribes were excluded. It is difficult to understand complaints that the petitioners' due process rights were abridged.

Further, existing law (including the Administrative Procedures Act) provides relief if any denials of due process occur in the existing FAP process. The Tulalip Tribes research has not disclosed any judicial decision holding that the existing FAP abridged the due process rights of any petitioner. If such denial of due process occurred, the courts would correct it.

The alleged problem of the possibility of inconsistent standards and decisions concerning acknowledgment that are the pretext for S611 would, if they existed, hardly be resolved by the establishment of a process that provides for a separate set of three scholars to serve as the judges on each Appeals Panel for each petition (S611(6) (a) and (b)), who are left to establish their own meeting schedule and methods of work

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there were a problem, it could certainly be remedied easily within the existing FAP process without the unwarranted "slap" S611's findings (e.g. Section 2(4)) and methods (a new "independent"\35 process, see S611, Sections 3(4) and (5)) would take at the integrity and competence of the existing FAP process and staff.\36

The "reality" of the existing effort to enact new FAP

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(Footnote 34 continued)
(S611(c)), and, unlike the existing centralized FAP decision-making process, may have no inkling of what has occurred and how standards have been applied in the case of other petitions, or as to the nuances of facts and circumstances that would warrant different results. Such a scenario is much less likely to lead to consistency than the existing process.

Further, as noted by the FAP overview of its process provided to the Committee in its May, 1988 oversight hearings, FAP has generally found that:

> "The experts on any given group tend to be advocates or antagonists of the group. It is somewhat difficult to find neutral researchers, with previous experience with the group. We would therefore be contracting with researchers who must not only become familiar with the regulations and the process but also the group itself."

This same problem would permeate the new "Appeals Panel" process. If "neutral" experts were found to serve, it is doubtful they would have any particular expertise concerning a petitioning group itself.

It would be unwise to make the so-called "experts" the judges of their own expert "opinions". Instead, it is preferable to leave review of FAP to the Federal Courts under the Administrative Procedures Act, and to leave the experts in their more traditional role as witnesses.

35. Independent of what? Why? Per S611 (6)(b)(2)(A), petitioning groups which are mere voluntary ethnic associations would no longer have to worry about the existing FAP staff (which has been unwilling to extend recognition carte blanch to any group that requests it) judging their petitions. And see, 5.3.2.2 above and footnote 45 below.

36. If FAP did something wrong, why didn't groups like the Samish go to court instead of letting that opportunity go by and then engaging in continual "post-hoc" behind-the-scenes "whining" that amounts to sour grapes? Good losers?

legislation is that certain petitioning voluntary ethnic associations have been unable to meet their fair burden of persuasion as to their historically continuous existence as Tribes, and now want to rewrite and weaken the rules of the game and require it to be started over again and be decided by biased judges so that they cannot lose.

6.1 S611 Is Substantively Unfair, Arbitrary, Biased, Unconstitutional, And Violates The Due Process Rights Of And The United States Trust Responsibilities To, Real Tribes That Oppose The Trivialization Of Tribal Sovereignty.

The pretext provided by the noble goals set forth in S611 (3) fail to hide the real motives and intent of S611, which would fulfill the alleged urgent need...to "clarify the eligibility" of "Indian groups" to be acknowledged as "Indian tribes," See, S611 (3)(6), through substantive provisions designed to "assure the eligibility" for recognition of virtually all petitioning Indian groups.\37

6.1.1 The "automatic recognition by administrative delay" provisions of S611 (See, 5.3.1 above) provide an interesting new substantive standard\38 for determining that a group is an Indian Tribe, and a revealing glimpse of the real motives of the drafters of S611--to restructure the FAP process to be incredibly biased and one-sided in favor of petitioning groups.

Closer examination reveals that this problem permeates and infects the entire bill, and warrants rejection of S611 in its entirety, not an attempted "cure" through a patchwork of amendments.

6.1.2 The provisions of S611 (14)(g) of S611 that would

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37. There has never been any ambiguity that needs "clarifying" as to the eligibility of true sovereign Tribes to be recognized. If the intent is to also allow the recognition of "groups," why not just define "Tribe" as "any aggregation of Indians" and accomplish the apparent intent of S611 in a simpler, more direct fashion? Maybe the bill should also be re-titled the "Voluntary Indian Ethnic Association Relief Act of 1989".

38. Can there be any doubt that this new test would be consistently applied to assure that all Indian Tribes are accorded equal treatment (Section 3(4)) and to insure a "consistent legal and historical basis" for the special government-to-government relationship between the United States and Indian Tribes (Section 3(2))?

allow the new Appeals Panel to overturn the binding decisions of Article III Federal Court judges, in administrative proceedings to which the parties to the Federal Court action may not even be parties,\39 and (if they are) from which they may not seek judicial review,\40 are, on their face, a grossly unconstitutional abuse of the due process right of interested parties, and are unconstitutional for other reasons as well.\41

6.1.3 Other substantive provisions of S611 which are, on their face, grossly unconstitutional abuses of the due process rights of opposing interested parties in quasi-judicial recognition proceedings include:

6.1.3.1 The provisions which would allow a "negotiated recognition" to occur at all; and those which would allow this to occur in off-the-record, closed-door meetings between the petitioners and their judges, in which interested parties are given no right to participate or comment or even see a written document containing the reasons for the decision which constitutes final agency action that is immune from judicial review. See, 5.4.1 above, and Sections 8(f), 8(g), 12(a) and 12(c) of S611; and

6.1.3.2 The provisions of S611 which create bizarre, arbitrary, and in some cases, conclusive presumptions with no basis in fact and which are made impossible to rebut; and which would make tribal status determinations hinge on criteria and factors which, in reality, are not at all determinative--in order to aid petitioners who cannot meet the legitimate burden of proof of tribal status that a real Indian Tribe could easily meet. See, for example, 5.3.2.1 through 5.3.2.5, and 5.3.3 (and subparagraphs) above.

6.1.4 These substantively unfair and unconstitutional provisions of S611, and the procedurally unfair and unconstitutional provisions discussed below, are a breach of the United States trust responsibility to the real Snohomish and Snoqualmie Tribes (now known as the Tulalip Tribes), who kept their treaty promise to remove and to settle on the Tulalip Indian Reservation--if they allow the recognition of the off-reservation imposter groups who meet none of the legal minimum standards of true and sovereign Indian Tribes.

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39. E.g., the State of Washington.

40. See, S611, Section 12(c).

41. See, footnote 17 above.

6.1.4.1 Section 12(e) of S611 provides that acknowledgment of a petitioner (e.g. the Snohomish and Snoqualmie groups who breached their treaty promises) will not have the effect of depriving any other Tribe (e.g. the Tulalip Tribes who kept their treaty promise) of any interest in or authority to govern it had before the acknowledgment. What about the claims these groups would surely then attempt to make to the much more substantial portion of the Tulalip Indian Reservation and its resources that are not presently held in trust and the valuable on and off-reservation treaty fishing rights of the real Snohomish and Snoqualmie Tribes? Would these groups then be entitled to share in the valuable treaty fishing rights the Federal Courts have previously said they do not have?

### 6.1.5 S611 Is Unconstitutional Because It Exceeds The Power Of Congress By Arbitrarily Broadening The Definition Of "Indian Tribe" To Allow Recognition Of Mere Voluntary, Private Associations, That May Or May Not Have Any Indian Members.

In United States v. Sandoval 231 U.S. 28, 46 (1913), the Supreme Court said:

> "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, or what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."

S611 would allow exactly what the Supreme Court said Congress could not do--arbitrarily create "instant Tribes" from groups that are not distinct Indian communities and do not meet the time-honored definition of "Indian Tribe". See, 5.3.1 - 5.3.3 above.

Accordingly, S611 is unconstitutional.

### 6.2 S611 Is Procedurally Unfair, Arbitrary, Biased, Unconstitutional, And Violates The Due Process Rights Of, And The United States Trust Responsibility To, Real Tribes That Oppose The Trivialization Of Tribal Sovereignty.

Apparently, the substantive unfairness, bias and unconstitutionality of S611 were not felt to be sufficient to adequately guarantee the recognition of virtually every group of Indian descendants who seek acknowledgement, so S611 also includes grossly unfair, biased and unconstitutional procedural provisions as well. Examples include:

6.2.1 The provisions that would allow quasi-judicial decision-making to occur in an off-the-record context behind closed doors, based upon private negotiations between the petitioners and their judges\42 from which interested parties who oppose recognition are excluded and given no opportunity for input or cross-examination,\43 or to comment, or to seek judicial review.\44

6.2.2 The provisions of S611 6(b)(3) which grant petitioners the right to veto the selection of one of their Appeals Panel judges. The purpose of this provision is to increase the probability that at least one member of the Panel is biased in favor of the petitioner--a right not afforded by S611 to opposing interested parties.\45

6.2.3 The Continual Relitigation provisions of S611 which create an apparently perpetual process until a petitioning group finally prevails, and in which an opposing interested party is not entitled to any finality from successful opposition. See, 4.2 above.

6.2.4 The provisions which allow a petitioner a right

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42. See, Section 6(c) as to the Appeals Panel and Section 12(a) as to the Negotiated Recognition Process.

43. See, 6.1.3.1 above.. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Goldberg v. Kelly, 397 U.S. 254 (1970).

44. Id.

45. The Supreme Court has stated that in every civil proceeding of a civil nature, whether before a court or an administrative tribunal, "an impartial decision maker is essential." Goldberg v. Kelly, 397 U.S. 254 (1970). The provisions of Section 6 of S611 which required the Appeals Panel to be composed of persons with expertise in both anthropology and history are also very likely to result in decision makers with an "anthropological bias", sympathetic to S611's relaxed definition of "community" as any network of social interaction, and, even if not intentionally biased, more prone under the broad latitude of this definition (See 5.3.2.2 above) and the other relaxed criteria of S611, to confer recognition upon a wide array of purely voluntary ethnic associations who do not meet the legal minimum standards to constitute a real Indian Tribe.

to appeal to the Appeals Panel (See, S611 (8)(h)) and to seek judicial review in a private lawsuit as the only party to the record (See, S611 (12)(c));\46 but allow interested parties a right of appeal to the Appeals Panel only if a Negotiated Recognition behind closed doors has not occurred,\47 and deny interested parties any right to participate in the event judicial review is sought by petitioners. See, S611(12)(c). And see, Lindsey v. Normet, 405 U.S. 56 (1972) (when an appeal is afforded, it cannot be granted to some parties and or arbitrarily or capriciously denied to others without violating the equal protection clause).

6.2.5 The provisions of S611(14)(c) which would allow the administrative re-opening and overturning of final Federal Court judgments, even though all parties to the Federal Court action are not parties to the administrative process. See, S611 14(c).

6.2.6 The provisions of S611(10)(c)(4) which bar the Secretary from raising new grounds for denial of a petition, even if grounds exist--but not from raising new grounds to grant a petition.

6.2.7 The provisions of S611(9)(d) which grant petitioners the opportunity to comment upon preliminary rulings of the Director, and the provisions of S611(9)(e) which allow petitioners an automatic 90-day extension of the comment period, but do not give similar rights to opposing interested parties.

6.2.8 The provisions of S611(8)(d) and (9)(c)(2) which entitle petitioners to a written explanation for the grounds of a decision and all supporting documents, but not interested parties.

6.2.9 The provisions of S611 (9)(f) which allow the Director to waive the requirements of S611 (7)(c)(4) that 75% of a petitioner's members be Indian descendants, and the 85% requirements of S611 (9)(d)(1)(A).

6.2.10 These procedurally unfair provisions of S611 also violate the United States' trust responsibility to the

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46. These provisions, in addition to being grossly violative of the due process rights of other parties to the quasi-judicial administrative record, are also unconstitutional because such litigation would be entirely collusive and without any "case or controversy".

47. See, 5.4.3 and 5.4.4 above.

Tulalip Tribes. See, 6.1.4 above.

7.0 Conclusion.

For the foregoing reasons, the Tulalip Tribes urge that S611 be withdrawn; and, if not withdrawn, defeated.

DATED this 2nd day of MAY, 1989.

BELL & INGRAM, P.S.

DOUGLAS L. BELL

James H Jones Jr.

JAMES H. JONES, JR.
Attorneys for Tulalip
Tribes of Washington

JHJ36C/36A/36G/36H/36Y/36X[11,13]

# ATTACHMENT "1"
# to
# Tulalip Tribes
# Legal Statement Re: S611

## Excerpts From Senate Report 91-1144
## And House Report 92-148

The legislative history of Public Law 92-30 (H.R. 1444, 85 Stat. 83), a bill to provide for the disposition of funds appropriated to pay Indian Claims Commission awards in favor of the Snohomish and Snoqualmie groups, consists of House Report No. 92-148, 92nd Cong. 1st Sess., and Senate Report 91-1144, 91st Cong., 2nd Sess.. The following are pertinent extracts from each Report concerning the groups of Snohomish and Snoqualmie descendants who participated as "identifiable groups" in the Indian Claims Commission proceedings.

Senate Report 91-1144 (p.9) and House Report 92-148 (p.4) incorporated in its entirety the March 16, 1971 Report of the Department of the Interior which, in pertinent part, found:

> "Under the Point Elliott Treaty, four separate reservations were established for all the treaty participants...[including] Tulalip or Snohomish. Many of the Snohomish Indians and a number of the Indians of the other three tribes settled on Tulalip Reservation along with other groups of Indians who participated in the 1855 Treaty, and it is where their descendants still live.
>
> The Indians were given an opportunity to obtain land allotment on Tulalip and 165 Indians were allotted, which included 76 Snohomish, 33 Snoqualmie, ...
>
> ...Through intermarriage and affiliation with other tribal groups, many of them have lost their original tribal identify. An indeterminate number of the Treaty Indians have never affiliated with any recognized reservation group and are now widely scattered. It is believed that the majority of them live throughout the Pacific Northwest. Their ancestors chose not to move to the reservation and continued to live in the area where homes had been developed prior to the 1855 Treaty. Later, they were given homesteads and fee simple or trust status on the public domain portion of the area occupied by the aboriginal groups. A considerable number of the Western Washington tribes and bands have managed to maintain their identities in some form, either as an organized or unorganized group, banded

> together for social purposes or to promote business enterprises.
>
> None of the tribes represented in these awards has a reservation which is exclusively its own. There is a group of Snohomish Indians which identifies itself as the Snohomish Tribe of Indians, ... and a group of Snoqualmie Indians which identifies itself as the Snoqualmie Tribal Organization. These organizations have not been recognized by the Federal Government as tribal entities. They have, however, been recognized for the purposes of prosecuting their land claims against the United States. (emphasis added) There is presently no existing organization known as the Skykomish Tribe, but among the present-day Snoqualmie tribal membership there are persons who have Skykomish ancestors.
>
> The individual members of these organizations are considered descendants of members of former tribes, rather than present-day members of successor tribes. (emphasis added) These organizations do not represent all of the descendants of the respective tribes. The majority of the members of these organizations are persons who have never affiliated with any reservation groups. The organizations have membership requirements, but such matters as degree of blood and proof of ancestry, etc., have not been verified. Persons have been able to register if they paid a fee."

Senate Report 91-1144 (p.3) and House Report 92-148 (p.9) also states:

> "The Snoqualmie and Skykomish tribes are not Federally recognized tribes and are organized for claims purposes only. While no written commitments were obtained; the Chairman of the tribes were consulted. Normally, these groups meet on a yearly basis or upon special notices being sent to its members. Members are scattered throughout the State of Washington."

With respect to the Snohomish and Snoqualmie Indian Claims Commission awards, House Report 92-148 (p.10) describes the beneficiary of such awards as:

> "Scattered living descendants of members of 1855 Tribe. Include both reservation and non-reservation affiliated descendants. Entitlement solely on basis of descent; no blood degree restriction."

House Report 92-148 (p. 11) describes the Snohomish and Snoqualmie groups as follows:

> "Not recognized as formally-organized tribes; Informally organized to prosecute claims as:
>
> Snohomish Tribe of Indians
>
> * * *
>
> Snoqualmie Tribal Organization
>
> Members considered descendants of members of former tribes rather than present-day members of successor tribes.
>
> * * *

Senate Report 91-1144 (p.13) and House Report 92-148 (p. 11) describes the condition of the members of the Snohomish and Snoqualmie groups as:

> "Widely scattered in Pacific Northwest area... Indians have not retained distinctly Indian culture traits. Generally integrated into non-Indian community and appear to utilize services available to them as citizens."

Senate Report 91-1144 (pp. 18-19) also states, with respect to the tribal organization of the Snohomish group:

> "The group of Snohomish Indians which identified itself as the Snohomish Tribe of Indians is primarily composed of non-reservation Indians who have been managing their own affairs for many years. The group has never been formally recognized as an organized tribe. Its principal purpose has been to prosecute land claims against the United States; it is also concerned with maintaining the identity of the Snohomish Indians. The group has no reservation of its own, no tribal assets, and no official tribal headquarters. It functions under a set of bylaws adopted by the membership in 1950.
>
> Membership in the organization is open to all persons who have proven their Snohomish ancestry, but does not allow dual enrollment. Therefore, the organization does

> not represent all persons of Snohomish ancestry. Those who have more or less settled on the Tulalip Reservation have not affiliated with the organization since it was last reorganized in 1950."

House Report 91-148 (p.16) has identical findings.

With respect to the membership of the non-reservation Snohomish group, Senate Report 91-1144 (p. 22) states:

> "There are no records of the non-reservation Snohomish Indians...They lived among the general population in non-Indian communities and have had little or no occasion to keep in touch with the Bureau of Indian Affairs."

House Report 92-148 (p.17) is identical.

With respect to the organization of the non-reservation Snoqualmie group, Senate Report 91-1144 (p.24) states:

> "The Snoqualmie Tribal Organization has been in existence for many years. It was established for the purpose of prosecuting claims against the United States and it has maintained itself solely for that purpose. The group has no reservation and has not been recognized as an organized tribe by the Federal Government, and individuals are considered descendants, rather than present-day members of a successor tribe.
>
> * * *
>
> Tribal and social affairs of the group has been limited to annual meetings and infrequent special meetings of the council, or the general membership called as needed to discuss claims matters. Attendance at general meetings in recent years has been small, usually 20-30 persons. ..."

House Report 92-148 (p.22) is identical.

The membership of the non-reservation Snoqualmie group is described in Senate Report 92-148 (p.25) and in House Report 92-148 (p.23) as follows:

> "Some of the Indians of Snoqualmie-Skykomish descent still live in the vicinity of Fall City and Carnation, the area traditionally considered tribal territory. The majority of these Indians are now dispersed throughout the State of Washington and the rest of the Pacific

> Northwest. Therefore, reasonable, accurate population figures are not available...."

Senate Report 91-1144 (p.12) further describes the beneficiaries of the Indian Claims Commission awards in Docket Nos. 125 (Snohomish) and 93 (Snoqualmie) as follows:

> "Scattered living descendants of members of 1855 tribe. Includes both reservation and non-reservation affiliated descendants. Entitlement fully on basis of descent; no blood degree restriction"

Senate Report 91-1144 (p.13) also describes the organizations of the Snohomish and Snoqualmie groups that participated in the Indian Claims Commission proceedings as follows:

> "Not recognized as formally organized tribes; informally organized to prosecute claims as: Snohomish Tribe of Indians... Snoqualmie Tribal Organization.
>
> Members considered descendants of members of former tribes rather than present-day members of successor tribes. (Majority non-reservation-affiliated Indians.) Not representative of all descendants...."

Senate Report 91-1144 (p.15) further describes the Snohomish and Snoqualmie groups as follows:

> "The Indians of the respective tribes have retained few of their cultural traits which would be considered as distinctly Indian culture.... They have, in general, integrated into non-Indian communities and appear to be utilizing the services available to them as citizens.
>
> Federal services are not extended to the Indians as members of the respective tribes, but to them as members of other groups located on-reservations. ...."

# ATTACHMENT "2"

to

Tulalip Tribes

Legal Statement Re: S611

# HISTORICAL EXHIBITS

Record of the organization
and incorporation of the
Snohomish Tribe of Indians"
a corporation and of the minutes
of the organization.

EXHIBIT I-1

Foster re Corporation work

J. GRANT HINKLE,
Secretary of State

STATE OF WASHINGTON
DEPARTMENT OF STATE
OFFICE OF THE SECRETARY
OLYMPIA

[illegible]
Asst. Secretary of State

August 8, 1927

This is to acknowledge receipt of ______________ Articles of Incorporation of the Snohomish Tribe of Indians

together with remittance for $ 7.45, to cover fee for filing and recording same. [illegible]

The papers were filed on August 8, 1927, and a certificate of such filing will be issued and mailed to you as soon as recorded which will be in about 60 days.

*You are now authorized to commence business.

In any future correspondence relative to this filing, please refer to ARTICLE NO. 83736.

Respectfully,
J. GRANT HINKLE, Secretary of State,

By Ray Yeoman Indexer.

*This does not apply to Banks, Trust and Insurance Companies, who receive their authority to commence business from the Supervisor of Banking and State Insurance Commissioner.

State Form No. 1474—1921. Approved as to Form by Dept. of Efficiency. [illegible]

EXHIBIT 1-2

Article No. 63780.

DOMESTIC

# Department of State
Olympia

OFFICE OF THE
Secretary of State

I, J. GRANT HINKLE, Secretary of State of the State of Washington, do hereby certify that

## ARTICLES OF INCORPORATION
OF THE
SNOHOMISH TRIBE OF INDIANS

a Domestic Corporation, of Tulalip Washington, were, on the 8th day of August A. D. 19 27 at 9:05 o'clock A.M. filed for record in this office and now remain on file herein, being duly recorded in Book 147, at page 430-436, Domestic Corporations..

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Washington.

Done at the Capitol, at Olympia, this 13th day of September, A. D. 19 27.

J. GRANT HINKLE,
Secretary of State.

By A M Little
Assistant Secretary of State.

EXHIBIT I-3

[illegible] AS TO THE INCORPORATION [illegible] AND [illegible]
OF SNOHOMISH TRIBE OF [illegible]
"SNOHOMISH TRIBE OF INDIANS."

STATE OF WASHINGTON:
COUNTY OF KING:

William Shelton, president, Flora Vandervoort, vice-president, Alice D. Palmer, secretary, and E. E. Shelton, treasurer, being first duly sworn, on oath each for himself or herself, certifies deposes and says: That they are all of the trustees of the above named corporation, that each of the above named persons respectively holds office which he is hereinabove alleged to hold in the "Snohomish Tribe of Indians", a social corporation; that the 24 day of August, 1927, at the hour of eleven o'clock A. M., at 1220 Alaska Building, in the city of Seattle, State of Washington, was the date and place of the first meeting, and there were no adjournments thereof, and at said first meeting the above named persons, being all subscribers to said agreement, met pursuant to due notice signed by William Bishop and E. E. Shelton, directed to all of the subscribers which said notice was served on all of said subscribers personally more than seven days before the date appointed in said notice for said meeting; and that at said meeting all of the above subscribers were present and participated in all of the proceedings of said meeting.

That the following two pages of this certificate are a co[illegible] of the agreement, and true triplicate original, of the agreement of association for the purpose of forming the "Snohomish Tribe of India[illegible] a social corporation, with the names of the subscribers thereto, and all of them.

[redacted]

EXHIBIT I-4

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This agreement, made and entered into in triplicate, this 21st day of July, A.D. 1927, in the City of Seattle, County of King, State of Washington.

WITNESSETH:

That the undersigned subscribers do hereby associate themselves together for the purpose of and with the intention of forming a corporation under the provisions of the laws of the State of Washington, [illegible] the provisions of an Act entitled "Incorporation of Social, Charitable and Educational Associations," approved March 21, 1895, and of the amendments thereto.

The name of this corporation shall be "Snohomish Tribe of Indians."

The purposes for which this corporation is formed are: The establishment and maintenance of an association for promoting, encouraging and fostering the literary, social and educational development of its members; the [illegible] and cultivation of closer acquaintance and [illegible] among the members of the corporation; for the

## AGREEMENT TO ASSOCIATE FOR THE PURPOSE OF FORMING A CORPORATION UNDER THE NAME AND STYLE OF SNOHOMISH TRIBE OF INDIANS.

This agreement, made and entered into in triplicate, this 21st day of July, A.D. 1927, in the City of Seattle, County of King, State of Washington,

WITNESSETH:

That the undersigned subscribers do hereby associate themselves together for the purpose of and with the intention of forming a corporation under the provisions of the laws of the State of Washington, that is to say, under the provisions of an Act entitled "Incorporation of Social, Charitable and Educational Associations," approved March 21, 1895, and of the amendments thereto.

The name of this corporation shall be "Snohomish Tribe of Indians."

The purposes for which this corporation is formed are: The establishment and maintenance of an association for promoting, encouraging and fostering the literary, social and educational development of its members; the establishment and cultivation of closer acquaintance and comradeship among the members of the corporation; for the

[redacted]

EXHIBIT 1-5

prosecution of charitable, benevolent, historical, literary, scientific, artistic and monumental purposes; to buy, sell, lease, mortgage and hold real and personal property; and to hire, lease, purchase, and erect suitable buildings for its accomodation to be devoted to the purposes hereinabove set forth.

William Shelton

This corporation shall be located in the City of Tulalip, County, of Snohomish, State of Washington, and the corporation shall have no capital stock.

William Bishop

R.E. Shelton

Subscribed and sworn to before me this 12 day of August, A.D. 19

Flora [illegible]

Notary Public in and for the State of Washington, residing at [illegible]

Alice F. Palmer

William Shelton

[redacted]

EXHIBIT 1-6

William Shelton

Flora Vandewoort

Alice D. Palmer

P. E. Shelton

Subscribed and sworn to before me this 24 day of August, A.D. 1927.

Notary Public in and for the State
of Washington, residing at Seattle.

EXHIBIT 1-7

Tulalip Indian Agency
Tulalip, Wash., Apr. 6, 1929.

Aug. F. Duclos, Superintendent
Tulalip Indian Agency, Wash.

Dear Mr. Duclos:

In conformity to Circular No. 2565 relative to tribal organizations on the Tulalip Indian Reservation, the following is the Committee who represents the Snohomish Tribe of Indians residing on the Tulalip Indian Reservation, Wash:

Committee elected for life: William Bishop, Pres.
Robert E. Shelton, Sec.

Charles Jules
William Shelton
William Hicks
Mrs William Hicks
Sam Dan
Josie Celestine
Jim Snoqualmie
Mary Moses
Joe Shelton
Sam Shelton
Robert E. Shelton.

No other information is available at this time.

Very truly yours,

CRB

Agency Farmer.

EXHIBIT 2

H-7 [illegible]

046

Tulalip Indian Agency,
Tulalip, Washington
March 7, 1936.

Mr. George L. Harris,
4032 - 8th N.E.
Seattle, Washington.

Dear Mr. Harris:

I am in receipt of your letter of March 2 in connection with information for the American Guide.

1. Total number of tribes under the Tulalip Indian jurisdiction.

Under this jurisdiction there are nine distinct tribes, as follows: "Sno-ho-mish," "Swin-o-mish" Skagit-Suiattle (pronounced Soo-attle), "Hooksack", "Lummi," "Suquamish," "Puyallup," "Clallam," and the "Muckleshoots".

The Snohomish Indians are more centrally located on the Tulalip Indian Reservation. The Swinomish Indians are located at LaConner across the Swinomish Slough. The Skagit-Suiattle Indians do not have any reservation. They are a "Public Domain" band of Indians, the old Indians having originally had allotments outside of the reservations. They are located near Darrington. The Hooksack Indians are also a Public Domain lot, being located near Everson, north of Bellingham. The Lummi Indians have a reservation West of Bellingham, near Marietta and Ferndale. The Suquamish Indians have a reservation called the "Port Madison Reservation" near Suquamish, across from Seattle. The Puyallup Indians have no reservation, being Public Domain, and the same applies to the Clallam Indians, who are located mostly on the Olympic Peninsula. The Muckleshoot Indians have a reservation known as the Muckleshoot Indian Reservation near Auburn.

EXHIBIT 3-1

2. The official names of each tribe are those given in the first paragraph.

3. The official names of the tribes do not differ from those designated by the Indians themselves, as they are Indian names.

I sincerely hope that the above information will be of some value to you and to the American Guide.

For further information regarding reservations and tribes under other jurisdictions, I refer you to Superintendent N. O. Nicholson, Taholah Indian Agency, Hoquiam, Washington; Supt. C. R. Whitlock, Yakima Indian Agency, Toppenish, Washington; and Supt. Harvey K. Meyer, Colville Indian Agency, Nespelem, Washington. I am sure that they will be able to give you some valuable information pertaining to the Indians in their respective jurisdictions.

Very respectfully,

O. C. UPCHURCH
Superintendent

EVB*

EXHIBIT 3-2

**WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.**
A FEDERALLY RECOGNIZED TRIBE
STATE ROAD, RFD 137 GAY HEAD, MASSACHUSETTS 02535 (508) 645-9265

Hon.Daniel K. Inouye, Chairman
Senate Select Committee on Indian Affairs
Washington, D.C. 20510-6450 May 5,1989

Testimony of Donald A. Widdiss, President, Wampanoag Tribal Council of Gay Head, Inc. regarding S-611; Indian Federal Acknowledgement Administrative Procedures Act.

Mr. Chairman:

Please enter the following testimony in support of S-611 to the record:

I am currently President of the 580 member Wampanoag Tribal Council of Gay Head, Inc., a tribe recognized through the existing federal acknowledgement process, codified in 25 CFR part 83, in the Spring of 1987. At this time we are the only federally recognized Indian tribe in Massachusetts. I feel this legislation addresses a need that can be demonstrated by my tribe's experience.

Our experience with the federal acknowledgement process, while successful, was one of frustration. As a small non-federally recognized tribe with no experience dealing with the Dept. of Interior, Bureau of Indian Affairs, our efforts seeking recognition on behalf of the Gay Head Wampanoag people reflected the problems associated with the existing process.

First, a little background. The Wampanoag Tribal Council of Gay Head, Inc. filed suit in U.S. District Court in 1973 seeking return of tribal common lands illegally taken by the state of Massachusetts through incorporation of the town of Gay Head in 1870. This case, a classic 1790 Non-Intercourse Act suit, involved the threshold issue of tribal recognition. At that time there were no existing regulations addressing tribal status and the tribe felt it was being punished for maintaining independence from the time of contact; our isolation and adaptive nature precluding entering into a significant treaty or legislative relationship with the federal government.

Recognized tribes with a government to government relationship established by treaty or specific legislation were well known and documented. Eastern tribes, such as the Gay Head Wampanoags with DOCUMENTED contact with non-indian settlers as early as 1602, found that the federal government preferred to stand by as tribes sought justice and recognition through courts and state governments.

In response to the need for a consistent method of judging tribal requests for recognition and, I suppose, partly in response to the many pending Non-Intercourse suits, Dept. of Interior, Bureau of Indian Affairs promulgated regulations, 25 CFR 83, in 1978. These regulations set seven distinct criteria to be addressed by a petitioning tribe. The degree of expertise, documentation, and funding required to complete such an undertaking seemed formidable.

At that time our tribe had begun a process of negotiating a settlement of the tribe's land claim (P.L. 100-95)with the state, town, and non-indian taxpayers as parties. It also became apparent that for any settlement of the tribe's land claim to become valid congress needed to approve.

During the period from 1973 to 1981 (when the tribe supported by referendum a settlement of the land suit) much research and documentation supporting the tribe's claim had been going on. It was discovered that in order for congress to approve settlement legislation, tribal status had to be determined. Neither the court, state, or tribe could assert their responsibility regarding the settlement.

With assistance from the Native American Rights Fund, Administration for Native Americans, and the contributions of many supportive people, including Dr. Jack Campisi, the tribe submitted documentation in response to 25 CFR 83 to the Federal Acknowledgement Project (FAP), Bureau of Indian Affairs, DOI, in 1983. In 1985, after initial review of the documentation, the Bureau of Indian Affairs, FAP, returned a negative finding for recognition, citing specific problems with two sections of the criteria. The tribe, feeling that the process had not addressed the issue of recognition objectively, presented additional evidence through the appeal process. This Important documentary evidence was reviewed by FAP and, after reconsideration, the Wampanoag Tribal Council of Gay Head, Inc. was granted federal recognition in February of 1987, overturning the prior negative finding and establishing the government to government relationship.

At no time during the process did I feel the Bureau of Indian Affairs, through the regulations, acted without bias. Instead, we found what seemed to be a general lack of specific knowledge of the contemporary eastern tribal experience and a process that tended to reflect subjective interpretation of documentation by unqualified reviewers. While many competent people were involved in the review process the potential for a negative finding remained the province of specific individuals with little or no experience with eastern tribes. I would want new petitioners to have a fair review of their supporting documentation and research.

I support the proposed legislation for the following reasons:

1. It is imperative that review of documentation be by the most qualified individuals. Removing the Branch of Federal Acknowledgement outside of the Bureau of Indian Affairs will enhance objective review of documentation. The new, independent office will have the opportunity to select professionals with the specific purpose of review of petitions and supporting documentation.

2. Because our tribe's process included an appeal of a negative finding, I feel the proposed independent appeals panel will tend to provide a responsive, supportive, professional situation that would maintain the necessary expertise and objectivity to assess any valid appeals and supportive documentation. In our case, appealing to the SAME AGENCY that returned an initial negative finding proved to be the ultimate frustration.

3. The authorization of a fund within the Administration for Native Americans to specifically assist petitioners will enhance the opportunity for viable tribal groups to support a research effort that results in submission of a well documented petition for acknowledgement.

4. The appointment of the Director of the Office of Federal Acknowledgement, "...without regard to political affiliation...", is a positive and necessary consideration regarding depoliticizing the petition process.

5. The proposed legislation clarifies criteria and streamlines a process that will have to address the needs of a segment of the indian population that has been overlooked or ignored. The clarifying language will serve to provide petitioners and reviewers with a consistent set of criteria by which to judge applicability of a tribe's particular situation.

In closing, it is to the credit of the Chairman and the Select Committee that such significant and appropriate legislation is introduced in this Congress. I thank you for your consideration.

Sincerely,

Donald A. Widdiss

Donald A.Widdiss
President
Wampanoag Tribal Council of Gay Head, Inc.

**WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.**
**A FEDERALLY RECOGNIZED TRIBE**
**STATE ROAD, RFD 137 GAY HEAD, MASSACHUSETTS 02535 (508) 645-9265**

## RESOLUTION

**WHEREAS**, the Wampanoag Tribal Council of Gay Head, Inc. is the recognized governing body of the Gay Head Wampanoag Tribe, a Federally Recognized Indian Tribe, and;

**WHEREAS**, the Wampanoag Tribal Council of Gay Head, Inc. has been a direct beneficiary and knowledgeable of previous administrative requirements under the Federal Acknowledgment Process, codified in 25 CFR part 83, and;

**WHEREAS**, the Wampanoag Tribal Council of Gay Head, Inc. acknowledges the efforts by the United States Congress to streamline the procedures under the Federal Acknowledgment Process, and;

**BE IT HEREBY RESOLVED** that the leadership of the Wampanoag Tribal Council of Gay Head, Inc. supports without reservation the passage of S-611 of the Indian Federal Acknowledgment Administrative Procedures Act.

**CERTIFICATION**: The motion was made and duly seconded to adopt the above resolution at a meeting of the Officers and Board of Directors of the Wampanoag Tribal Council of Gay Head, Inc. on Wednesday, May 3, 1989 there being a quorum present.

The motion was voted, and carried, by a vote of 11 for, and 0 against.

I certify that the above resolution reflects a true and accurate representation of action taken at the scheduled meeting of the governing board of the Wampanoag Tribal Council of Gay Head, Inc. There being 11 members present and constituting a quorum.

Donald, President DATE: 5/4/89

RESOLUTION NO: 8917

David E. Vanderhoop V.P. 5/4/89

# TESTIMONY BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS ON S. 611

By Jack Campisi
Associate Professor of Anthropology
Wellesley College, Wellesley, Massachusetts 02181
May 5, 1989

## INTRODUCTION

25 CFR 83.7 contains seven criteria that a petitioner must satisfy in order to achieve acknowledgment. S. 611 Sec. 7 contains six of these criteria, the only one deleted is (g): "The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship." The bill carries forward the prohibition against the acknowledgment of splinter groups, political factions, and similar associations which separate from the main body of a federally recognized tribe and adds language specifically protecting those tribes listed in the federal register by the Assistant Secretary of the Interior for Indian Affairs on July 10, 1986, as well as tribes acknowledged subsequent to that announcement. Other than tribes made eligible by the deletion of criterion (g), no group can be acknowledged under the act which was prohibited under 25 CFR 83.

Criteron (a) calls for "A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis as

'American Indian,' or 'aboriginal.'" The bill (Sec.7 2(c)(1) provides for essentially the same language, adding the phrase "or the members of the petitioner." It drops "aboriginal" since that term serves no special purpose of identification. The types of evidence necessary to satisfy this criterion remain the same, the only change being that the criterion is conclusively demonstrated by documentation by Federal officials that the petitioner is Indian, "but only for such times as that identification or relationship is documented."

The second criterion in 25 CFR 83.7 deals with community. In many ways this is the most difficult criterion to satisfy. In part this is because it is so poorly stated in the regulations. It requires the petitioner to submit "(e)vidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area." The definition of community in the regulations adds nothing that can assist the researcher in satisfying the criterion. "'Community' or 'specific' area means any people living within such a reasonable proximity as to allow group interaction and a maintenance of tribal relations." If one applies the criterion and definition literally, it appears that all the researcher has to demonstrate is that the members of the group live close enough to each other to interact. The staff of the BAR has never operationalized the criterion or provided meaningful guidelines applicable to all for conducting community research. A review of submitted petitions, Obvious Deficiency letters and the technical reports accompanying findings suggests that the staff of the BAR is itself uncertain as to what constitutes sufficient evidence of this criterion, and that there exists differences in interpretation within the staff. This lack of clear definition has resulted in an increasingly more difficult standard for petitioners to meet and significant differences in the way petitioners are treated with respect to this as well as other criteria.

The problems with this criterion are remedied in the proposed legislation. First, the bill provides the researcher with a number of research techniques. Second, it defines community in terms that are more readily operationalized. Community "means the existence of a network or networks of social interaction among tribal members differentiating members from non-members, with due regard to the size, geographic proximity, relative isolation and institutional character of the group." The emphasis is upon interaction among tribal members and between them and the non-Indian community or communities in their vicinity. Third, the bill recognizes that it is sufficient to show that the petitioner's members have continually resided in a given area in order to satisfy this criteria. Fourth, unlike the regulations, the bill requires that the petition show its existence as a community from historical times, that is, from the earliest period of sustained contact, or 1790, whichever is later.

A word needs to be said concerning the term "historical times." Contact and exploration in North America was no orderly process, carried on by individuals interested in leaving a detailed record of the native populations. More often than not it was an invasion by semi-literates on the lands of non-literates. Consequently, there are few records beyond the cursory note or ethnocentric comment left by most of the early travelers. Certainly there is no consistent pattern of observations until the establishment of permanent non-Indian settlements. Even then, for most groups, the records are sparse and loaded with all of the racist views so prevalent duirng the three centuries of contact. Added to this was the common occurrence of records being lost or destroyed and one gets an impression of the difficulties that petitioners face in documenting their history. Historical times must be, at the very least, considered from as beginning only when there was sufficient non-Indian population to allow for the maintenance of records, not when the first transient explorer or fur trader passed through the area.

Criterion (c) of the regulations require that the petitioner show that it has "maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present." It should be noted that there is nothing in the criterion or in the definitions that require that political continuity be shown to exist continuously or from generation to generation. This is an interpretation supplied by the BAR staff. The bill adopts the above wording changing it to read, after the word entity, "... continually from historical times to the present."

There are two modifications which I believe make for a fairer process. First, in terms of the lapse of time between examples of political activity, a fifty year gap is acceptable provided there is no data to demonstrate that the group ceased to exercise authority or influence. The present assumption is thirty years, from generation to generation. Given the nature of the evidence to demonstrate political continuity, as well as the general attitudes toward Indians for most of the nineteenth and twentieth centuries, it is unreasonable to expect that individuals would attempt to exercise influence in such an overt manner that non-Indians would have recorded it, or that Indian groups would have maintained records of activities that would engender the wrath on the non-Indian neighbors.

The second modification that I believe to be scientifically justified relates to the nature of community. It is reasonable from a social science standpoint to assume that if one can demonstrate that there existed a community at some point in time, that that community had some political processes for making decisions, maintaining order, and punishing violators of its rules. Since much of the decisionmaking in Indian communities occurs within the framework of large interlocking extended families, one can hardly expect to find detailed records kept of the day-to-day decisions. From an anthropological standpoint, it is extremely difficult to conceive of a community without values, beliefs, and rules, and means to enforce them. Thus to demonstrate community is to reasonably infer the presence of a political process.

The remaining criteria require the petitioner to show proof that at least 75 percent of its members descend from a historical tribe or tribes and demonstrate that its members are not members of any other tribe.

There is a second track available to tribes which can put forward a treaty, Congressional Act, or Executive Order as a basis for acknowledgment. These tribes must show that at least 85 percent of the contemporary members of the group descend from the tribe upon which it bases its claim for expedited treatment.

## APPEALS

There is one additional part of the bill which I wish to discuss, and that is the sections dealing with the panel and appeals. To place my remarks in perspective, I wish to bring to your attention an excerpt from an article written by Dr. William W, Quinn, Jr., formerly an ethnohistorian with the BAR. Writing in the journal The Public Historian (Vol. 10, No. 2, pps 71-76), Dr. Quinn makes the following remarks concerning the acknowledgment process and the power exercised by the staff of the BAR:

> Anyone who works for the government, or any large bureaucracy, for that matter, will question whether it is actually within the authority of a level GS-13 government ethnohistorian to make decisions of such relevance to the personal lives of so many. The answer is, effectively yes; technically no. The BIA's public ethnohistorian in the Branch of Acknowledgment and Research, along with his colleagues, makes a recommendation to acknowledge or deny a petitioning group. This recommendation is sent up the line of administrative authority for signatures, and, if

> ultimately signed by the Assistant Secretary of the Interior - Indian Affairs, it becomes policy. Although the assistant secretary makes the final decision, in the ten years of the branch's existence, a recommendation from the Branch of Acknowledgment and Research has never been overruled. It may be that, in some future case, a recommendation will be negated by an assistant secretary for political reasons, but this official would then have to explain to the interested parties affected, to their communities, to the press, and possibly to congressional committees, why, in the face of so much ethnohistorical data, he or she chose to decide against the recommendation.
>
> It has therefore been the public ethnohistorian at the BIA who, with his colleagues, effectively decides the fate of the Indian groups that petition for federal acknowledgment. The signature of the burea's chief executive officer, while bestowing administrative legitimacy on the recommendation, is essentially a prefunctory act which, since the inception of the federal acknowledgment process, has been done *pro forma*. (page 76; emphasis in the original).

Dr. Quinn has put his finger on a serious weakness in the present system; there is no effective means to challenge an adverse finding. No matter how qualified the staff of the BAR is, it is not infallible. Petitioners deserve the right to appeal a finding to a panel of experts. Surely, as scholars, the staff of the BAR would welcome the opportunity of having their findings reviewed by eminent anthropologists and historians.

After all, peer review is the essence of the scientific method.

For these reasons I support the concept of an independent panel of scholars, chosen for specific cases because of their expertise, but who would not become permanent employees, thus avoiding the development of another level of beaurocracy.

## CONCLUSION

This bill, if enacted, will result in a fairer, more expeditious process for determining whether a petitioner is to be acknowledged. The changes are modest, but will have a significant positive impact on what has become a tedious, exasperating, and expensive process.

# Testimony to the U.S. Senate Select Committee on Indian Affairs on the Subject of Administrative Procedures to Determine the Status of Certain Indian Groups,

S.611 May 5, 1989

Raymond D. Fogelson
Department of Anthropology
University of Chicago

I wish to testify in favor of Senate Bill 611, "to establish administrative procedures to determine the status of certain Indian groups". In my estimation S.611 is a positive response to chronic problems in the Federal acknowledgement process that have now reached a condition of crisis. Bill 611 goes a long way toward remedying many of the problems addressed during the May 26, 1988 hearing of this committee at which I offered testimony. It seems evident that present procedures contained in 25 CFR 83, as administered by the Branch of Acknowledgment and Research of the Bureau of Indian Affairs are inadequate on several counts.

First, there is the problem of expedience. In October of 1978 when the current acknowledgement staff was organized, there were 40 petitions for recognition on hand. In the interval at least another 70 petitions were received. Over this ten-year period, 23 cases were decided: 8 groups were granted Federal recognition, 11 were denied acknowledgement, and another four were resolved outside the acknowledgement process. By my crude reckoning, at the current pace, without considering possible increased efficiency by the Branch or the likely probability that new petitions will be received, it will take another 37.83 years to process the existing petitions. Obviously something must be done to speed up the process, so that members of groups with legitimate claims to Federal Recognition can receive in their own lifetimes the help they so desperately need. Bill S.611, with its provisions for increased staffing, stricter deadlines, assistance in preparing petitions, and closer oversight, promises to reduce the present deplorable time lag significantly.

In my previous testimony I recommended that additional personnel should be allotted to the Branch of Acknowledgement and Research. I now feel that the creation of a new, independent Office of Federal Acknowledgement in the Department of the Interior, as stipulated in S.611, is a preferable alternative. While I respect the individual conscientiousness, competence, and integrity of members of the B.A.R., I believe that an Office separate from B.I.A. will be more immune to possible allegations of conflicts of interests or to the potential influence of Bureau policy and attitudes. The latter danger was brought to my attention during the Hearing of the Senate Select Committee on S.2672, "To provide Federal Recognition to the Lumbee Tribe of North Carolina". Although he carefully eschewed pre-judging the case, the former Commissioner of Indian Affairs, Ross Swimmer, warned about creating "another pocket of paternalism" and "forcing them (the Lumbees) into a guardian/wardship relationship". It seems to me that the B.I.A. has enough to do in administering Federal Indian programs and serving the needs of its Indian clientele without also assuming the additional role of gatekeeper.

A second problem with 25 CFR 83 concerns the criteria for acknowledgment. As I read the present Bill and compare it with 25 CFR 83, the mandatory criteria for recognition remain essentially in tact and some previous ambiguities are clarified. The fear that passage of S.611 will open the floodgates for bogus groups seeking recognition seems unfounded.

One refinement concerns criterion (7) (C) in the 1978 regulations, which reads, "A statement of facts which establishes that the petitioner has maintained tribal influence or other authority over its members as an autonomous entity throughout history to the present". In S.611 this criterion may be satisfied "by showing that the petitioner formed a community at that time". The word "community" should cause no concern, since it is used in 25 CFR (7) (b). If a formal definition of community is required the following should suffice: "a human community is a functionally related aggregate of people who live at a particular geographical locality at a particular time, share a common culture, are arranged in a social structure, and exhibit an awareness of their uniqueness and separate identity as a group" (B.E. Mercer, The American Community, New York: Random House, 1956. P 27). The definition and usage in this Bill follows the social anthropological understanding that enduring communities must possess leadership, decision making mechanisms, and formal or informal sanctions over its members. It also recognizes that social control in most traditional Native American societies was based more on shared values and common traditions than by externalized laws and coercive political apparatus.

A second refinement in S. 611 involves the establishment of group continuity over time. The 1978 regulations require "A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as 'American Indian' or 'aboriginal'". For many unrecognized groups, as well as for many recognized tribes, this historical continuity is difficult to document. In my previous testimony I discussed problems of ethnohistorical documentation of political, or communal, continuity. Many groups deliberately adopted a low profile to avoid persecution, conscription, or removal from what they took to be their traditional or secondary homelands. They avoided census takers, tax collectors, and often deliberately refused to send their children to school. As a result, documentation may be missing for long periods and absent at critical junctures of the group's history. The Bill before us recognizes that gaps in the historical record can occur, "If a group demonstrates a fact or status at one point in time and at a later point in time, but no more than fifty years later, continuity of that fact or status will be presumed for the intervening period, absent proof to the contrary". To me, this seems like a reasonable operational clarification of the meaning of the ambiguous expression "substantially continuous", since it takes into account native realities, does not unduly privilege written documentation for frequently unlettered and often marginalized peoples, and yet allows for the presentation of contrary evidence.

A third shortcoming of the present Federal Acknowledgement Procedures is the lack of a suitable means of appeal. In S.611 provision is made for the establishment of an independent Federal Acknowledgment Appeals Panel. Such a panel was suggested in the Senate Select Committee Hearing of May 26, 1988. Petitioners who are denied acknowledgement should have the right to appeal the decision. At least one of the decisions already handed down by the B.A.R. has proven controversial and deserves review. Since each case is in its own way unique, future inconsistencies in the application and interpretation of the criteria for recognition are likely to occur. Fairness dictates that a qualified, independent panel, selected by the Secretary of the Interior, be empowered to review the primary data and basis on which the decision was reached. There appears to be some consensus for the formation of such a panel.

In my previous testimony I urged that "steps should be taken to make the relationships between the petitioners and the Branch of Acknowledgment and Research less adversarial and more mutually constructive. I beleive S.611 takes some important steps in this direction. The Bill provides some financial assistance to groups mounting a petition to support research and obtain legal help. Until now a limited amount of assistance has been offered by various charitable groups. The cost of submitting a petition can exceed several hundred thousand dollars, and few, if any, petitioning groups can be considered affluent. The awarding of grants to petitioning groups could have two results. First, it will enable petitioners to make their claims on a "more level playing field". And second, it should help produce more complete petitions and thus lessen the number of obvious deficiencies, a major source of the present slowness in processing petitions. The present Bill also specifies that materials on which preliminary decisions are made be supplied to the petitioners for response and rebuttal. Finally S.611 includes as a general provision to

> establish an administrative procedure for the cooperative reconciliation of disagreements of fact or law at the option of the petitioner. This

> procedure shall be designed to provide the staff of the Office, and persons performing research for the petitioners, with an opportunity, in an informal and non-adversarial manner, to -
>
> (1) seek agreement on the interpretation of the evidence which was submitted or which may be available,
>
> (2) review the adequacy and consistency of their research methodologies, and
>
> (3) consider resolving any remaining issues of fact through cooperative research activities.

To appropriate an inappropriate partisan expression, and risk the displeasure of Democrat supporters of S.611, this Bill presents a "kinder and gentler" face than current procedures in the acknowledgement process.

In conclusion, I urge passage of S.611. Its implementation will be costly, but in the long run it will be cheaper than allowing the present procedures for acknowledgement to drag on for forty more years. And this estimation does not factor in the tragic loss of human capital.

# Testimony to the U.S. Senate Select Committee on Indian Affairs, May 5, 1989, regarding S. 611, A Bill to Establish Administrative Procedures to Determine the Status of Certain Indian Groups

William C. Sturtevant
Curator of North American Ethnology
Smithsonian Institution

(I testify in my personal capacity, as an anthropologist with 40 years' research experience on the history and culture of North American Indians, including serving as organizer and General Editor of the encyclopedic _Handbook of North American Indians_, of which 8 of the projected 20 volumes have now been published.)

The criteria (and definitions) for Federal Acknowledgment in S. 611 make more explicit and easier to apply the standards for recognition that already exist, as these are published in 25 CFR Ch. 1 (4-1-87 ed.) part 83, taking into account the modification and elaboration of these criteria that the BIA's Branch of Acknowledgment and Research has developed. They do not weaken the criteria, in that they will not result in the recognition as tribes of groups that would not be so recognized by the fair and consistent application of existing regulations. This is because the criteria in S. 611, insofar as they differ from those in 25 CFR pt. 83, are the result of experience with the problems anthropologists and historians have in applying the present criteria--not because these latter are too stringent, but because they are too vague, not sufficiently relevant to the actual anthropological and historical facts to which they are supposed to apply.

The criteria, and the definitions involved in them, that are set out in S. 611 are acceptable and correct from an anthropological and historical point of view. They will allow the identification and recognition as tribes of groups that share the crucial characteristics of the many tribes that are already Federally recognized. Experienced anthropologists and historians can more readily and more fairly advise the Federal government on whether or not these characteristics are present than they can with the existing criteria.

_Autonomy_. S. 611 requires that the petitioner is "essentially distinct from any other Indian tribe," thereby allowing the recognition of relevant historical and anthropological facts. The existing regulations refer to a "separate tribal council," "internal processes," and then provide a loop-hole: "or other (undefined) organizational mechanism." The result is the same as for S. 611, but it is (or can be made to be) more difficult to demonstrate.

Community. S. 611 gives a good, simple definition, that is both acceptable as social science and agrees with common understanding. It refers to a network of social interaction that differentiates the community from its neighbors, and suggests how this network can be discovered. The existing regulations simply say that a community is people living nearby one another (adding that this proximity "allows"--but note, not requires--"group interaction and a maintenance of (undefined) tribal relations"). The vagueness, even illogicality, of this has resulted in the growth of ad hoc criteria that petitioners are now required to address.

Membership. The criteria here are essentially the same as those in 25 CFR Pt. 83, except that a percentage of people descended from an historic tribe is specified. Thus the existing criteria are made more stringent (but S. 611 does not include the administrative procedures that now, illogically, require that each current member of the group consents to being listed--as though membership in a tribe were voluntary). S. 611 does not introduce any criteria of membership that are more "racial" (and less political or social) than are existing recognition regulations or existing laws and practices regarding Indian identity.

Political offices. S. 611 makes explicit that if a community can be demonstrated to have existed, internal political relations can be assumed. This recognizes what is obvious, not only to anthropology but to everyday experience: every community has means of facing problems, of controlling or influencing the behavior of its members, of differentiating degrees of influence and authority among its members. On the other hand, S. 611 does not require petitioners to prove the existence of a formal political structure of offices of a kind that hardly any tribe that is already Federally recognized has had throughout most of its history.

Historical. S. 611 gives an alternative, beginning history at the later of two points: either 1790 (when Federal recognition began), or the beginning of sustained contact with non-Indians. The latter is when the continuous historical record (that must be appealed to) begins, not, in many cases, at the point of "earliest documented contact" (as 25 CFR Pt. 83 has it)--petitioners should not be required to document continuity from the time of de Soto (the 1530s) or Eric the Red (the 12th century A.D.).

Continuity. S. 611 is here equivalent to the criteria of 25 CFR Pt. 83, except that it clarifies the ambiguous "essentially without interruption" and "substantially continuous," by requiring the assumption--one regularly made by anthropologists and historians, and borne out by what is known about social and cultural change--that a gap in documentation of 50 years (in the course of a usually scantily documented history) is not significant if the phenomena documented before and after the gap are essentially the same. Common sense makes very similar assumptions, and it is unreasonable to require petitioners to find documentation to demonstrate a continuity that is already evident.

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In sum, this bill clarifies the criteria of eligibility for Federal recognition as a tribe, making them easier to apply without weakening them. It will be easier to reject a petition as well as easier to accept one. Justice will be better served.

## FEDERAL ACKNOWLEDGMENT WORKING GROUP STATEMENT

The working group on federal acknowledgment was assembled at the request of the Senate Select Committee on Indian Affairs. The group was composed of witnesses who testified at the Committee's oversight hearing held last year and who were supportive of legislative reform. Originally, the Committee proposed that legislation be introduced in fall 1988. But it became readily apparent a credible bill would require extensive work and the 101st Congress became the target for introduction. Our first meeting took place on October 31, 1988. Since that time we have had numerous meetings and each person has expended considerable time in drafting and reviewing legislation, attending meetings, and conducting research.

The starting point was how to take the testimony from the oversight hearing of last year and bring together a bill that would correct the problems and address the issues raised. This task was not easy. Each of us involved held similar as well as different points of view. As we worked, debated, and drafted and redrafted the bill, an overall consensus as to the structure of a bill finally emerged which is reflected by S. 611. Its outline generally follows the FAP regulations with some clarifications and additions.

We would like to explain the underlying precepts of our approach. Some of us will also be submitting individual testimony and will elaborate further as to particular issues. In addressing the scope of the legislation the group kept in place the current regulations that allows all Indian groups to submit petitions for acknowledgment, whether in Alaska or in the lower-48. The legislation was never conceived to include Native Hawaiians and, if necessary, technical amendments can be made to clarify this issue. Terminated tribes are allowed to go through S. 611, but in no way is that mandatory nor exclusive. We believe the preferable route will be for terminated tribes to be legislatively restored.

At the core of the group's task was to come up with standardized criteria. This was to ensure that petitions for federal acknowledgment were being uniformly evaluated. Much to our dismay, rumors have been circulating in Indian country to the effect that S. 611 lessens the criteria such that anyone could qualify as an Indian. Each requirement under Part 83 is still required except that the provision barring terminated tribes from availing themselves of the process is deleted. Definitions are provided, and the bill makes clear the types of documents or showings of proof needed to satisfy each criteria. The group relied on those witnesses from last year's hearing who are anthropologists and historians to guide the deliberations so the changes meet the current practice in the social sciences.

In addition, the Group believed that the process should ensure that a petitioner receives a fair, impartial and reasonably quick review of its petition . Thus, the bill creates a new Office of Federal Acknowledgment, modeled after BAR, but outside the BIA. The Group felt that this was a necessary approach because only 40% of the BAR's time is spent on petition work under active consideration. In addition, there is at least the potential of conflicts of interest between the BAR and the BIA. The new office ensures prompt review and removes even the appearance of conflict in that it would be accountable strictly to its work, and not to administration policy, budget considerations, competing obligations, nor political influence from recognized tribes who the BIA serves.

Another issue of importance that S. 611 deals with is lack of an independent board to review a determination against federal acknowledgment. Currently, the regulations allow the Assistant Secretary's decision to be final for the Department unless the Secretary requests him to reconsider. Under reconsideration the Assistant Secretary consults with the Secretary to review his initial determination and whether to reconsider it. Therefore the initial decision goes back before the Assistant Secretary (Branch of Acknowledgment and Research) who made the negative finding in the first place.

Under S. 611, an independent scholarly panel will review the staff work. If the panel and the office disagree, then the petition goes to the Secretary for a final determination. This independent panel will help to ensure "correct" decisions and provides additional due process protections. The possible alternative of a hearing before the Office of Indian Hearings and Appeals is an inferior alternative given the nature of the review that must be engaged in. Going before the Office of Hearing and Appeals would turn the process from a scholarly and potentially cooperative process to an adversarial and legal process.

Finally, the Group was confronted with the legal proposition that unless an Indian tribe has been terminated by Congress, its legal relationship with the United States continues. Some petitioners, for example, are named in a treaty that was never abrogated. Their legal status is different than a group that was never acknowledged by the federal government. The expedited review in S. 611 specifies those instances of prior acknowledgment (treaty, executive order, or act of Congress) and creates a presumption to that effect which can be rebutted by the new acknowledgment office. This approach reflects the case law and pre-1978 BIA practice.

Unfortunately, much misinformation has circulated about S. 611 that we believe deflects attention from the central issues that must be addressed and are addressed in S. 611. Of course, while we are all in agreement that S. 611 presents a comprehensive, reasoned approach, we recognize that some comments have been raised which indicate that further refinements to some specific provisions in the bill may be necessary and we encourage the Committee to consider such refinements. However, if the purpose of federal acknowledgment reform is to maintain the status quo by legislating the current regulations, this poses a non-answer to a very serious problem. While the motivating factor for Committee action naturally comes from the constituents in the members respective states and from the tribes who are served by the Committee, we urge the Committee to recognize that this issue cannot be viewed under so limiting a perspective. There are communities who have existed from historical times to the present with an Indian identity and who deserve fair consideration of whether they should be federally acknowledged. Because of limited resources, these communities are frequently unable to have their views heard. We urge the Committee to act on this issue based upon the merits of this problem.

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# STATEMENT TO THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

RE: S. 611

"INDIAN FEDERAL ACKNOWLEDGMENT ADMINISTRATIVE PROCEDURES ACT"

MAY 5, 1989

BY JACK F. TROPE AND ALLOGAN SLAGLE, STAFF ATTORNEYS

Mr. Chairman and Committee members. Thank you for inviting us to testify before this Committee. Over the years, the Association on American Indian Affairs, Inc., a national Indian advocacy and service organization located in New York City, has assisted tribes in their efforts to obtain federal recognition. We are currently working with a number of California tribes seeking acknowledgment. (An analysis of the California situation is attached.) In addition, we have participated in the Federal Acknowledgment Task Force, headed by the Native American Rights Fund, which has played a key role in the development of this legislation.

Our position on federal acknowledgment is summarized in the attached testimony which we submitted to this Committee in May 1988. Unfortunately, that testimony was inadvertently omitted from the hearing record at that time and we are for that reason resubmitting that testimony today to be part of this hearing record. Many of the proposals in that testimony are included in S. 611. Thus, we believe that S. 611 is an important and positive first step toward improving the federal acknowledgment process. We view the intent of this bill as making the process quicker, fairer and better designed to determine the "legitimacy" of tribes in accordance with modern social sciences practice. We do not believe that the bill is meant to ensure the recognition of certain tribes or in any way to "tilt" the process.

In that regard, while we are supportive of the overall approach in S. 611, we do believe that there are some provisions of the bill that need to be revisited to ensure a balanced approach to this issue. While much of what is contained in the critical commentary that has been prepared by opponents of the bill is hyperbole and exaggeration, some of the comments have merit and should be seriously entertained.

For example, we agree that automatic recognition of a petitioning group if deadlines are not met could lead to the recognition of "bogus" tribes; this is too extreme of an enforcement mechanism. In addition, there are certain comments that have been made pertaining to the impact of some of the evidential presumptions in the bill which must also be carefully considered -- particularly comments pertaining to those presumptions which are defined as conclusive in S. 611. We are not prepared today to give you a detailed rundown on those sections of S. 611 which might be revisited and how the bill should be changed. However, we support a careful analysis and refinement of S. 611 as it goes through the legislative process. To that end, we support a continuing dialogue with both supporters and opponents of the bill so that the end product is a bill that meets the criteria that we have discussed above. We will continue to analyze S. 611 and contribute our ideas concerning the federal acknowledgment process as part of that dialogue.

We urge this Committee to move forward from this hearing to report a bill which addresses the concerns that we raised in our attached testimony from 1988.

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## STATEMENT TO THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

## RE: OVERSIGHT HEARING ON THE FEDERAL ACKNOWLEDGEMENT PROCESS, MAY 26, 1988

Mr. Chairman and Committee members. Thank you for inviting us to submit testimony to this Committee. We are vitally interested and deeply involved in the issue of federal recognition for tribes which currently lack a relationship with the Federal Government.1/

### Summary

Our experience leads us to the following conclusions and recommendations:

(1) the system is too complex, cumbersome and expensive and not well designed to meet its central purpose --

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1 The Association on American Indian Affairs, Inc. (AAIA) is a national non-profit citizens' organization headquartered in New York City and dedicated to the preservation and enhancement of the rights and culture of American Indians and Alaska Natives. The policies of the Association are formulated by a Board of Directors, the majority of whom are Native Americans. Over the years, the Association has assisted a number of tribes in their efforts to obtain federal recognition. Recently, we have begun to develop a more comprehensive program in this area. We have organized a panel of individuals actively involved in the federal acknowledgement process to help us design and implement a system that will help tribes move through the recognition process more quickly and efficiently. In the near future we will launch a field program designed to utilize this system to assist a number of tribes to achieve federal recognition.

determining the legitimacy of petitioning groups;

(2) more money is needed to support the two essential parts of the system -- the work of the Bureau of Acknowledgement and Research and the preparation of petitions by the "unrecognized" tribes;

(3) a two tier recognition process should be developed:

(a) tier one would consist of tribes who meet certain basic criteria; these tribes would receive expedited consideration utilizing simplified procedures and standards;

(b) tier two would be made up of the remaining applicants; the criteria applicable to these tribes would also be modified to ensure that the system is fairer, more accessible and better designed to achieve its stated goals;

(4) a blue ribbon panel should be convened to:

(a) develop criteria for tribes that would be placed in the first tier and a mechanism for expediting consideration of these tribes; and

(b) recommend reforms to the existing process applicable to the remaining tribes which would simplify and improve upon that process.

In the remainder of our testimony, we will discuss in more detail our conclusions and recommendations and explore issues that should be considered by the blue ribbon panel.

## The Problems

(1) A backlog of completed and almost completed petitions await review by the Bureau of Acknowledgement Research. When the BAR was established it was expected to have four teams of reviewers, not only two teams as at present. Yet the Reagan Administration has continually refused to ask for additional money, notwithstanding the considerable backlog. As of April 1988:

110 tribes have indicated an intent to apply for federal recognition -- of these --

11 have been recognized by the BIA or Congress;

11 have had their petitions denied;

29 have submitted petitions and are at varying stages

of the review and response process, specifically

6 are awaiting a preliminary review of their petitions,

11 are currently responding to obvious deficiency (O.D.) letters,

4 have submitted responses to O.D. letters and are awaiting review of those responses, and

8 have fully completed petitions awaiting final BAR review (there are proposed findings for 3, 2 on active review and 3 waiting review).

Since the BAR only works on two petitions at a time and, under the current system, the average review takes six months, it will be years before the currently completed petitions are reviewed. If a significant number of the O. D. responses are received in the near future, some tribes will wait many years.

(2) There are numerous groups that have indicated an intent to petition that have not completed their petitions even after many years because of the complexity and cost of the process. An informal AAIA survey of tribes who have not fully completed their

petitions indicates that almost all of these tribes need more money to prepare a petition. We estimate that the average petition costs at least $50,000. This estimate covers only the cost of the initial petition and not the costs of responding to an O.D. letter. The Administration for Native Americans (ANA) has provided some funding for unrecognized tribes. However, for the purpose of petition preparation it will only award grants of $25,000. Moreover, less than half of the unrecognized groups applying to ANA receive grants.

(3) The existing system has evolved into a test requiring extraordinary effort and massive documentation. The level of justification required is far greater than required by the underlying purpose of the federal acknowledgement process, namely, to determine whether a petitioning tribe is legitimate.

(4) Some petitioning groups have complained that the process is unfair to tribes. They have charged that the process is politicized and that standards of review are not uniform. We are uncertain of the extent to which the process has been politicized. We believe that the BAR is made up of competent, honest professionals who try to approach their review in a professional fashion. However -- like most people -- they have their biases and may be influenced by external pressures. Results may vary depending upon the individual circumstances

surrounding the review of a particular petition. Clearly, this is not desirable.

In short, the process is very long and very expensive. The system is inherently weighted against those it is designed to serve.

## Solutions

The first response to these problems is clear. The system needs more money. The BAR needs more funds to hire more staff so that it has its full complement of four review teams. Moreover, ANA or other funding for petition preparation must be expanded.

Increasing resources is only one part of the solution, however. Efforts must be made to decrease the cost of petition preparation. At AAIA, we are attempting to find ways to decrease petition costs through our Federal Recognition Project. (See footnote 1).

More importantly for the purposes of this hearing, however, the process should be modified to reduce its complexity and cost and address the issue of its fundamental fairness. To develop these modifications, we recommend the establishment of a blue ribbon panel. This panel would include academics, legislators, executive branch employees, members of petitioning tribes and currently recognized tribes and representatives of other interested organizations, such as national Indian advocacy organizations. We recommend that such a panel be directed to develop a two-tier system which will include a "fast track" review for some petitioning groups and a modified version of the existing system for the remaining tribes seeking recognition. The purpose of these changes would be to ensure that:

(1) the system reflects its underlying purpose -- determining legitimacy;

(2) the process is fair, with all legitimate groups ultimately receiving recognition;

(3) the cost of the process is decreased, thereby making it more accessible; and

(4) the process is reasonably quick, so that tribes do not have to wait years before their petitions are finalized and

processed.2/

In developing a two-tier approach to federal acknowledgement, the blue ribbon panel will need to develop criteria for selecting fast track tribes, establish a mechanism for expediting a recognition determination, evaluate the process for the remaining tribes and recommend reforms. We offer no definite opinion about how these issues should be finally resolved at this time. Following, however, is a synopsis of issues, observations and questions that we believe should be carefully considered by the panel.

Obviously, the showing that should be required to qualify for the "fast track" should be less than the showing required by the current petitioning procedure (or else there is no purpose to it). Fast track criteria might include:

(1) evidence of a past treaty or other explicit recognition by the United States or, before that, with Great Britain, France or Spain;

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2 It is important to underscore that the failure to be recognized can have devastating consequences on members of unrecognized tribes -- see, for example, the recent IHS regulations restricting eligibility for health services. Consequently, we urge Congress to issue a moratorium on denying eligibility to members of petitioning tribes where they are currently receiving services until their tribal status is finalized or a certain amount of time has passed without a petition being filed.

(2) evidence of the descendency of present-day tribal members from members of the previously recognized tribe;

(3) evidence of a present-day existing socially intact community;

(4) collective landholding by the petitioning group over an extended period of time;

(5) recognition by State or local governments or other Indian tribes; and

(6) some minimal evidence (considerably less than required by the current process) of an on-going sense of community during the period between the time of past recognition and the present.

Many of these criteria (and others) were discussed in the report of the American Indian Policy Review Commission.

Once the fast track tribes are identified, there are several ways in which the process might be expedited:

(1) legislative recognition for tribes who make the requisite showing, absent the presentation of conflicting

evidence to Congress;

(2) shifting the burden of proof to the BIA once a showing is made -- the BIA would then be required to grant recognition within a limited period of time unless the BIA obtained evidence which seriously placed into the question the issue of tribal status; or

(3) priority review by the BAR of the petitions of such groups.

The panel would also need to review the adequacy of the regular petition process applicable to the remainder of the tribes. As noted, we believe that the system must be simplified and the panel should focus upon the core question of what constitutes legitimacy. There are a number of ideas that merit careful consideration, including the following:

(1) analyzing legitimacy in the broadest sense -- a macroanalysis, rather than a microanalysis. For example, a gap of 20 or 30 years in evidential support of tribal continuity should not be fatal to a tribe's chances at recognition if the broad picture shows a basic pattern of continuing group identity;

(2) a focus on "social group identity" over the time period

in question and a deemphasis on "political continuity". In our review of previously submitted petitions, we have found that some emphasis has been placed upon the existence or non-existence of an internal hierarchal leadership structure in determining tribal existence at any point in time. We do not believe, however, that this sort of "political continuity" is a crucial component of legitimacy in most cases for two reasons:

(a) Many tribes had no "political" structure before contact with Europeans as the Western world defines "political". Tribes established hierarchies primarily to facilitate contact with the outside world; internally social relationships were more egalitarian and informal. Since many of the unrecognized tribes went underground to continue to exist, there would have been no need for hierarchal leadership.

(b) The absence of political continuity is usually the result of outside government and social pressure and not the voluntary act of the tribe in question. If the tribe has maintained its distinct identity in the face of outside pressures, that by itself should be sufficient to prove legitimacy. (Obviously, evidence of "political institutions" can help to show social group continuity.)

In addition, the panel should consider the nature of the appeals process open to applicants and challengers. We do not believe that the best interests of petitioning tribes are served by encouraging an excessively legal approach to the process. A cooperative, collegial, non-legal review process within the BIA is the best model for all concerned. However, some sort of independent check on the BAR accords with basic standards of fairness. Among the ideas that should be considered are:

(1) creation of an independent academic panel to review key elements of the BAR's findings if the BAR decision is appealed; this panel would advise the Secretary of the Interior and/or the Congress as to whether it agrees with the BAR's findings on those key issues; and

(2) requiring a final administrative decision to issue findings of fact and specify all documents which were relevant to its review and decision. This would allow a reviewing authority to better evaluate the probity of the administrative determination.

We hope that these suggestions are helpful to you. We stand willing to assist in efforts to reform the federal acknowledgement process. Thank you once again for inviting us to submit testimony to your committee.

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# THE SPECIAL PROBLEMS OF CALIFORNIA TRIBES SEEKING ACKNOWLEDGMENT

by ALLOGAN SLAGLE

At least 25 Indian groups in California already have submitted letters of intent to pursue federal acknowledgement. Also, presently, at least five rancheria groups terminated in the 1950s remain terminated. It appears that the total membership of all these groups totals about 8,000, with individual populations running 50-800, and the candidate groups are distributed throughout many rural area of the state, with most in the remote, thinly populated northern and central regions. The problem of acknowledgment and status clarification is more acute in this state than any other, partly due to unique historical and political factors. Due to the unique history of "discovery and conquest" in California, California tribes face peculiar difficulties in managing the present tests for federal acknowledgement, particularly with respect to proving cultural and political continuity. Some of these are:

- From time to time since discovery, many of the 200 + identified California Indian communities experienced an occasional unwilling hiatus of some years' duration in being able to associate freely in the open.

* Due largely to overwhelming political and economic pressures to exploit the state's resources, California Indian treaties were never ratified, and for fifty years the U.S. Senate concealed the embarrassing fact that they were made.

* For generations, California was allowed to promulgate and enforce laws suppressing open social and political activity of Indians to the point of breaking up of families and killing parents so that the children could be indentured.

* Extant records and documents of the kind which the BAR considers essential to proving continuity of tribal identity of such California Indian tribes are difficult to assemble, even those covering the post-1850 historical period, because of the rapid and drastic decimation or dispersal of large portions of many California Indian tribes, or narrow interest or lack of interest on the part of early non-Indian observers. The absence of evidence proving political or cultural continuity on the part of these groups for a period of more than a few years could prove fatal for a petition under the present process.

* Anthropologists and BIA administrators often have viewed political organization in California Indian communities idiosyncratically. Some candidate groups are remnants of

what were earlier much larger groups; but many always were very small distinct groups, which Kroeber and other California Indian specialists have called "tribelets" leading some to wrongfully infer that the political integrity of these communities was somehow inferior to that of tribes.

* The 1851 California Land Claims Act created a Commission to consider claims of parties holding lands under old Spanish or Mexican laws. Indians did not know of nor understand this Act and California failed to file on their behalf. The theory eventually prevailed that the failure of California to appear before the special claims board on the tribes' behalf nullified their claims and brought their lands under the public domain. California's politicians set their own Indian policy, and military and paramilitary forces met with fierce but finally unavailing resistance from the tribes.

* Since costs of petitioning run $50,000-150,000 for each group, costs for assembling petitions is beyond the means of most of these communities. Although the Administration for Native Americans has provided support for four petitioning tribes, ANA funds are not sufficient to accommodate all petitioners (and not terribly cost effective for ANA).

- Congress and various administrations collected and amalgamated populations of Indians, often relocating and consolidating fragments of traditionally hostile tribes or bands into larger, more manageable communities, often housing many such groups on a single reservation. Many did not relocate for various reasons. The Federal Government established land bases as sites for "village homes" for some of these "landless" California Indian tribal communities in the form of rancherias (such as Smith River). By 1915, however, of 19,000 California Indians (living in 55 of 60 California counties), only 1,800 lived on reservations created by Executive Order or otherwise and at least 4,500 tribal Indians were destitute and homeless. Although additional purchases (such as the Jane Hostatlas allotment at the ancient Tolowa town site of Nelechundun/Henry Ranch) were made in 1915 and thereafter using a set aside of $10,000 under the Joint Resolution of March 4, 1915 (and the Indian Homestead Act of 1875 and other statutes), the purchases were limited in scope. As stated in a September 9, 1917 memo to the Commissioner for Indian Affairs from Indians Services Inspector John J. Terrell in a memo of Sept. 9, 1917, more and better land for California was not purchased because of "the high prices of lands in most California counties," and "almost universal prejudices against a nearby permanent Indian village or home, and the small limit by reason of limited appropriation that can be applied for any one purchase." The tribal status of many groups continued to be unacknowledged and their conditions received only cursory study or attention.

Thus, because of historical circumstances, the current application of the FAP process is likely to place considerable obstacles in front of the recognition of California petitioners. Yet there is substantial reason to believe that California's unrecognized tribes are "legitimately tribes". For example:

- Historical documents show that while the 1851-1852 treaties were never ratified, the United States viewed surviving California Indian groups as tribes, including the vast majority of the current petitioners, and treated them and their members accordingly. Thus, the United States Congress appropriated money for the education, housing, and welfare of these Indians on the basis of their affiliation with their respective tribes.

- The Federal government purchase of individual public domain allotments in 1915 for "Homeless Indians" and the many "remnant bands" in California was designed to serve Indians remaining in particular areas who had not abandoned tribal relations.

- Congressional appropriations for now-unacknowledged

California tribes were applied as offsets to the claims won in the Indians of California v. United States claims case, and the Federal government has continued to deal with individual California Indians on the basis of their descent from these historical tribes accordingly. Most Indians of proven California Indian descent, or their descendants, living in California on July 1, 1852 and living in California on May 18, 1928, qualified to participate in the distribution of those claims though not all knew which treaty, if any, their own ancestors signed in the 1850's. The Congressional and administrative presumption was that all Indians of California, given the choice, would have chosen treaty-making to outright annihilation.

* In time, the Executive Order and other rancherias were treated as reservations for most useful intents and purposes in appropriating funds for their benefit for programs, tribal and individual services; in many ways the government has treated their populations as tribes (although the Bureau has frequently insisted that the rancherias were only lands set aside for homeless California Indians, and that the rancheria populations were not "tribes.")

* In 1962, Kroeber clarified the "tribelet" term he had coined, saying that the sovereignty of these groups and their political integrity compared favorably with the

original models of nations -- the Greek city-states -- and went so far as to compare the Yokayo Tribe of Indians on the Yokayo Rancheria (one of the present candidates for acknowledgment) to ancient Athens. However, the popular view generally ignores this anthropologist's clarification, leading many to assume that these groups are communities, but not tribes, though all members identify politically primarily with their own group.

* The difficulties in finding continual documentary proof of existence for some groups have little or nothing to do with free political choice or voluntary cessation of active tribal and cultural activities on the part of any historical California tribe.

* Many tribes and bands, particularly in rural areas, have survived to continue or resume political functions after their traditional lands became less attractive sites of economic activity and settlement for non-Indians, and such groups comprise the majority of candidate groups for acknowledgment.

The crisis in federal acknowledgment (and untermination), at least in California, exists primarily for tribal communities whose members have already been treated as Indians and who have received services as Indians for generations; now, due to self-determination policy, tribal membership in an acknowledged tribe, not degree of Indian blood, is becoming the sine-qua-non for being viewed and treated as an "Indian."

For all of these reasons, it is essential to California tribes that the federal acknowledgment process be streamlined and that the demands that it places upon tribes be limited to those that are truly necessary to determine legitimacy. Provisions in S. 611 would address many of the concerns raised above:

- S. 611 clarifies the terms for acknowledgment and the means of defining cultural and political existence and does so in harmony with the historical, legal, political and cultural criteria which the Congress has adopted and defined in practice and which Felix Cohen and others described. It refutes certain interpretations of the acknowledgment criteria which create pitfalls unrelated to questions of legitimacy.

- S. 611 recognizes that the non-recognition of California tribes results from a pattern of actions by the Federal government in which the government chose to not ratify treaty documents and to ignore Indian communities. The bill rectifies this problem by allowing California treaty tribes to shift the burden to the U.S. to disprove a petitioner's existence once a prima facie showing is made.

- In identifying many if not most of the California tribes as eligible for an expedited processing of their petitions, S. 611 would allow resolution of the special California problem with economies of scale for both tribes and the federal government. Thus, the process would become affordable.

- S. 611 may help resolve questions pertaining to intergovernmental relations between the United States and unacknowleged California tribes.

- S. 611 would allow about a half dozen terminated rancherias to apply for recognition under a fast track procedure. (In the 100th Session, Congress formally disavowed the effects of the termination policy. Under that policy, 38 California rancherias previously treated as reservations were terminated. Distributees of those rancherias included descendants of about 60 California Indian tribes. Many of these rancherias [and their distributees], terminated between 1961 and 1970, have been "unterminated" in the courts.)

In considering federal acknowledgment legislation, the Committee must keep in mind the special California situation and the great injustices which have resulted (and will continue to result through deprivation of services) if legitimate California tribes continue to be unrecognized through no fault of their own.

# TESTIMONY OF MICHAEL D. MASON, STAFF ATTORNEY, NATIVE AMERICAN PROGRAM OREGON LEGAL SERVICES ON S. 611 BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS,

MAY 5, 1989

Chairman Inouye and Members of the Committee, my name is Michael D. Mason. I am a staff attorney with the Native American Program Oregon Legal Services (NAPOLS) in Portland, Oregon. Thank you for the opportunity to present testimony on S. 611, the Federal Acknowledgment Administrative Procedures Act.

My testimony is on the potential impact of S. 611 on Indian tribes whose federal relation was terminated by Congress between 1954 and 1962. My firm has worked with terminated tribes in Oregon for over 10 years. We have assisted in the restoration of the Klamath Tribe, the Confederated Tribes of the Grand Ronde Community of Oregon, and the Cow Creek Band of Umpqua Indians. We currently represent the Coquille Indian Tribe in its restoration effort and this testimony is presented on the tribe's behalf. To our knowledge, this is the last tribe terminated in Oregon that is eligible for restoration by Congress.

Congress terminated the status of some 109 Indian tribes and bands between 1954 and 1962. Starting with the Menominee

Tribe in 1972, Congress has restored the federal relationship with 11 terminated tribes and confederations of tribes. In addition, 23 bands in California (rancherias) were judicially restored because of the BIA's failure to legally implement their termination acts. See, Table Bluff Band of Indians v. Watt, 532 F. Supp. 255 (N.D. Cal. 1981); Smith v. United States, 515 F. Supp. 56 (N.D. Cal 1978); Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal 1977); Hardwick v. United States, Cir. No. 79-1710 (N.D. Cal 1983).

Several tribes and bands remain terminated. Four rancherias are in litigation. See, Scotts Valley Band of Pomo Indians v. United States, Civ. No. 86-3660 (N.D. Cal.). Fourteen rancherias in California have not sought restoration. The Catawaba Tribe in South Carolina, the Coquille Indian Tribe in Oregon, the Northern Ponca Tribe in Nebraska, and the mixed-blood Utes of Utah also remain terminated. And although NAPOLS has worked for ten years to locate terminated tribes in Oregon and to restore their federal relationship, we cannot rule out the possibility that another tribe remains terminated in western Oregon besides the Coquille.

Nothing in this bill would reduce Congress' power to restore the federal relationship with these Indian tribes through restoration legislation. As Chairman Inouye stated in his dear colleague letter accompanying the draft bill, "this bill is not intended to supplant Congress' plenary power to acknowledge other tribes whose unique circumstances might be better accommodated by the legislative process." Letter of Senator Daniel Inouye, February 3, 1989. Indeed, the Congress is moving to so restore recognition of the Coquille Tribe. The Coquille Tribe Restoration Bill, H.R. 881, is scheduled for markup in the House Interior Committee. S. 521, its companion bill, is awaiting action by this Committee. Also, the Nebraska congressional delegation is considering introducing a bill to restore the Northern Ponca Tribe which in 1962 was the last Indian tribe to be terminated.

The unique circumstances of terminated tribes make them better accommodated for particularized congressional action. Tribes that once had a federal relationship had land bases and access to federal Indian programs, including loans for economic development. These lands and this access were lost at termination. Congress has used restoration legislation to provide for remedial measures such as return of reservation lands, e.g., the Grand Ronde Restoration Act of 1983, Public Law No. 98-165 (25 U.S.C. § 713-713g) and to provide for remedial attention regarding economic development, e.g., the Klamath Tribe Restoration Act of 1986, Public Law No. 99-398 (25 U.S.C. §566-566h).

The value of remedial language in a restoration bill is well illustrated by the example of the Grand Ronde Restoration Act of 1983. The tribe once had a reservation totalling about 55,000 acres. At the date of restoration, the tribe owned nothing but a small cemetery. The Act provided for a

**reservation plan which was to be presented to Congress. Congress reestablished the tribe's reservation in 1988, returning to the tribe nearly 10,000 acres of the tribe's former reservation. See, The Grand Ronde Reservation Act, P.L. No. 100 -425 (25 U.S.C. §713-713g). The reservation is prime timberland in Oregon that is expected to generate $1 million in revenue annually. The tribe is using this revenue for economic development, scholorships, and social programs. Without it, the tribe would have to forego most of these programs and projects and rely on federal dollars for the rest. Mere return of federal status, or acknowledgment, would not have resulted in this tribe's success story.**

S. 611 changes existing law to permit tribes whose federal relationship Congress terminated to be recognized through the administrative process created by the Act. S. 611 provides terminated tribes with an additional route for recognition while preserving Congress' power to directly restore such a tribe.

It should not be used to lengthen the already long period these tribes have waited to see justice done or to limit the remedial action that only Congress may provide.

The Coquille Indian Tribe generally supports S. 611. The Tribe, however, respectfully requests that the Committee make it clear that it intends that there be no departure from Congress' practice of restoring terminated tribes through particular legislation that addresses the unique circumstances of each tribe.

# STATEMENT OF KATHLEEN MCKEE, EXECUTIVE DIRECTOR, LUMBEE RIVER LEGAL SERVICES, and ARLINDA F. LOCKLEAR, on behalf of the LUMBEE INDIAN TRIBE OF NORTH CAROLINA on the INDIAN FEDERAL ACKNOWLEDGMENT ADMINISTRATIVE PROCEDURES ACT, S. 611, before the SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

May 5, 1989

The Lumbee Indian Tribe of North Carolina filed a fully documented Petition for Federal Acknowledgment pursuant to 25 C.F.R. Part 83 with the Branch of Acknowledgment and Research, Department of the Interior, in December 1987. The Tribe is represented before the Department on its petition by Kathleen McKee, Executive Director of Lumbee River Legal Services, and Arlinda F. Locklear, who make this statement on behalf of the Tribe on S. 611.

The Lumbee Tribe supports the enactment of S. 611 and applauds the effort of the bill's sponsors to address the serious problems in the present administrative recognition process. The extent and nature of the problems in the process -- vagueness in standards, inordinate delays in processing petitions, and inadequate funding -- have been well documented in three oversight hearings held by this Committee on the administrative process in 1978, 1983 and 1988. Witness after witness at those hearings spoke about the pressing need for improvements in the process. Even Department of the Interior witnesses acknowledged problems in the present process and promised needed reforms. At the 1983 hearing, the Department promised to hold and did hold a conference to discuss ways of streamlining the process. At the

1988 hearing, the Department promised to consider revisions to the regulations that might alleviate some of the concerns expressed. To date, none of the ideas discussed at the conference held in 1984 have been implemented and no proposed revisions to the regulations have been published for comment. It appears that legislated reform is the only means to obtain reform of the administrative acknowledgment process.

Because of its experience with preparing and monitoring progress of its petition for federal acknowledgment, the Lumbee Tribe is very familiar with the acknowledgment regulations and process. The tribe first began work on its petition for federal acknowledgment in 1980, or shortly after the acknowledgment regulations were published and the office to administer the regulations was established. It took the tribe seven years to research and draft its petition. During that time, the tribe worked closely with the acknowledgment staff and followed carefully the staff's processing of other petitions so that the tribe could prepare the best possible petition.

The tribe has been waiting now for one and one-half years for obvious deficiency review of its petition. The tribe has been advised that obvious deficiency review of the petition has begun, but has not been told how long that review will take. The only time projection made by the Department on processing of the Lumbee Petition is that the earliest possible date for completion of the process is 1993, seven years after filing the documented petition. The Lumbee Tribe believes that its petition is a strong one that demonstrates the tribe's entitlement to federal acknowledgment under the existing regulations. But the tribe's experience has convinced it that the process is in need of reform. The Lumbee Tribe believes that S. 611 would accomplish the needed reform in three important respects and urges this Committee to act favorably on the bill.

I. Clarification of substantive criteria

The present regulations require that a petitioner demonstrate seven criteria to establish entitlement to federal acknowledgment. 25 C.F.R. section 83.7 The regulations contain a definitions section, but leave many terms undefined. In addition, the amount or nature of proof of the criteria is not specified in the regulations at all. As a result, considerable discretion is left to the acknowledgment staff to determine what a particular petitioner must show and whether the petitioner has shown it.

For example, one of the seven criteria requires the petitioner to demonstrate the continuous existence of a community. Community is defined in the regulations as "people living in reasonable proximity as to allow group interaction and a maintenance of tribal relations." 25 C.F.R. section 83.1(o). The regulations do not specify what type of evidence or social science methodology should be used to demonstrate community. In some cases, the Department has read the community definition literally and acknowledged a petitioning group upon evidence only of physical proximity of its members without direct proof of actual group interaction. In other cases, the Department has required the petitioner to demonstrate actual group interaction through a complete ethnographic report. In its petition, the Lumbee Tribe did not prepare a complete ethnographic report, but did demonstrate geographic proximity and group interaction in some areas among its members. Thus, the tribe has met the criterion, but will not know whether the acknowledgment staff will require more evidence until it receives its obvious deficiency review.

S. 611 carries forward all seven criteria in the existing regulations, including proof of community, but S. 611 clarifies the petitioning group's burden of proof. With respect to community, S. 611 specifies that a petitioning group must demonstrate actual group interaction, i.e., the existence of a network or networks of social interaction. The bill further provides, much like the present regulations, that the existence of a community can be presumed from close geographic proximity of the group's members. But unlike the present regulations, S. 611 makes explicit when such an assumption is warranted, i.e., when a substantial portion of the members have continually resided in a specific geographic area which formed at least a part of its territory from historical times. In other words, S. 611 eliminates the judgment call on the part of the acknowledgment staff of determining which groups must demonstrate actual interaction and which groups can rely on geographic proximity to demonstrate community. By doing so, S. 611 insures more even-handed treatment of petitioning groups and eliminates the guess-work on the group's part as to what it must prove in its petition.

Similarly, S. 611 clarifies a petitioning group's burden in proving the other criteria. With respect to political continuity, S. 611 uses essentially the same definition as the present regulations, but states that a group can show political influence by demonstrating the existence of a community at that given time. Because a community cannot exist without leadership, this linkage between the two criteria is anthropologically sound and supported by experts in the field who are testifying today. In addition, it eliminates another area of considerable discretion on the part of the acknowledgment staff. Although the present regulations do not state that political influence can be proved by the existence of a community, the actual practice of the acknowledgment staff has in some cases amounted to very nearly the same thing. Some petitioning groups have been acknowledged with only minimal proof of political influence over and above their proof of community, while others have been asked to demonstrate fairly structured political leadership. S. 611 eliminates this disparity in treatment among petitioning groups by specifying what evidence is required under given circumstances.

Finally, S. 611 makes plain how much evidence is required to demonstrate all the criteria. Section 7(e) provides that a fact is deemed proven if the petitioner shows the matter to be more likely true than not. This is basically the same as the preponderance of the evidence rule used in civil cases. Because this is the burden a petitioning group would bear if it were to litigate its tribal existence, this is an appropriate standard to employ in the administrative process. Such a provision would seem to be so obvious as to be unnecessary, but because of the past practice of the acknowledgment staff, it is necessary. On occasion, the acknowledgment staff has indicated that if there is one document that disputes Indian ancestry, for example, it raises a question as to Indian ancestry, even though there may be scores of documents to the contrary. Because of the conflicting influences and policies in Indian history, every tribe has been subject to disparaging or erroneous commentary. This provision of S. 611 eliminates the necessity for proving the impossible -- that every single documents tends to prove the seven criteria. It insures that where, based on the number and credibility of documents, a fact is more likely true than not, that fact is demonstrated for purposes of acknowledgment.

## II. Imposition of deadlines in the processing of petitions

In one respect, S. 611 makes a much needed and dramatic departure from the existing regulations, i.e., in the imposition of deadlines in the processing of petitions. In the present regulations, there are only two deadlines in the entire process. The regulations require first, that the Secretary shall acknowledge receipt of a petition within 30 days thereof, and second, that the Secretary shall publish his proposed finding on petition within 1 year (with a possible 180 day extension) of the notification of active consideration of the petition. See 25 C.F.R. sections 83.8(a) and 83.9(f). Significantly, there are no time limits on when the obvious deficiency review or active consideration of a petition must be begin. As a result, petitions can and have languished for years awaiting these steps. That is why some petitions, such as Lumbee, may take seven or more years to work their way through the process. Delays of this length are simply unacceptable.

S. 611 corrects this defect in the regulations by imposing deadlines on every step of the process. Reasonable time limitations are set for the obvious deficiency review, the beginning of active consideration, and the publication of a preliminary finding on the petition. Thus, petitioning groups are assured timely processing of their petition under S. 611.

The extent of this problem and the urgent need for time limitations cannot be overstated. In no other administrative process would Congress tolerate a situation where administrative action can be delayed indefinitely. That is precisely the current situation for Indian tribes seeking federal acknowledgment. Simple fairness to petitioning groups requires a dramatic change in that aspect of the present administrative process.

III. Clarification of eligibility to petition for federal acknowledgement

The present regulations provide that groups "which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship" are not able to petition the Department of the Interior for federal acknowledgment. 25 C.F.R. section 83.3(e) The Lumbee Tribe is well familiar with the catch-22 position tribes are now in because of this section.

The Lumbee Tribe is subject to an act of Congress which, while recognizing the tribe as Lumbee Indians, also provides that "Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." 70 Stat. 255. The Lumbee Tribe has sought for years a legal determination from the Department of the Interior as to whether the 1956 Lumbee Act is legislation forbidding the federal relationship within the meaning of the acknowledgment regulations, to no avail. The Department believes that the tribe should simply allow it to process its petition and then make the legal determination of whether it has authority to acknowledge the tribe. In other words, the Department would have the Lumbee Tribe wait seven or more years for the processing of its petition, and possibly be told at that point that the tribe does not fall within the scope of the regulations.

This is not a remote possibility. In fact, the Department of the Interior has construed a statute similar to the 1956 Lumbee Act as precluding administrative acknowledgment of the tribe. In 1986, the Department commented on a pending bill that would extend full federal recognition and services to members of the Ysleta del Sur Pueblo. The Yselta del Sur was subject to an earlier act of Congress which provided that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Tiwa Indians of Yselta del Sur." 82 Stat. 93. This language is identical to that appearing in the 1956 Lumbee Act and, according to the legislative history of the act, was modeled on the 1956 Lumbee Act. S.Rep.No. 1070, 90th Cong., 2d Sess. If the Department comes to the same conclusion with respect to the Lumbee Act, then the tribe's years of work on the petitioning and long wait for processing of the petition will have been for naught. The appropriate solution for clarifying the status of the Lumbee Tribe is the same for that of the Ysleta del Sur -- a special act of Congress extending full recognition and federal benefits to the tribe.

Earlier this week, Senator Sanford of North Carolina introduced a bill that would clarify the status of the Lumbee Tribe. The Lumbee Tribe is very grateful to Senator Sanford for his support and is hopeful that this bill will be enacted by the 101th Congress. However, no tribe should be left in the predicament that the Lumbee Tribe now finds itself. S. 611 would solve that problem by repealing all federal statutory bars to administrative acknowledgment of an Indian tribe so that the administrative route would be available to all non-federally recognized tribes. Significantly, S. 611 does not oblige tribes to use the administrative route. If for some reason, special legislation were preferable, for example, to simultaneously settle outstanding claims, address jurisdictional issues, or resolve other issues related to the tribe's status, a group could pursue that option as well. But S. 611 evens the administrative playing field so that tribes with a past, albeit terminated or limited, relationship with the United States, have the same opportunities open to them as other tribes.

The Lumbee Tribe's petition for federal acknowledgment has not been and will not be withdrawn by the tribe. Certainly, should the recently introduced Lumbee recognition bill fail for some reason, the tribe will actively pursue administrative acknowledgment.[1] Given the projection completion date on the Lumbee petition, the tribe has adequate time to pursue the legislative route. But with the enactment of S. 611, the Lumbee Tribe and others would be assured that their petition would be processed in a timely fashion and determined by reference to clear and evenly applied standards, where administrative action is desirable or appropriate. To make the administrative option a viable one, the Lumbee Tribe strongly supports the enactment of S. 611.

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[1] It is not clear whether the Lumbee Tribe would qualify for the expedited acknowledgment process under section 7(d) of S. 611 because of the 1956 Lumbee Act. The tribe believes that the Lumbee Act did recognize the tribe so that it would qualify for consideration under that section. The Department of the Interior has taken the opposite position. In all likelihood, a lawsuit would be necessary to resolve this legal question in the event the Lumbee bill is not enacted and S. 611 with the expedited process is enacted into law.

## STATEMENT OF DARRELL WADENA, PRESIDENT

THE MINNESOTA CHIPPEWA TRIBE
ON
S.611, the "INDIAN FEDERAL ACKNOWLEDGEMENT
ADMINISTRATIVE PROCEDURES ACT OF 1989"
Before
The Senate Select Committee
on Indian Affairs

May 5, 1989

Mr. Chairman and Members of the Committee,

I appreciate the opportunity to appear before the Committee to present the views of the Minnesota Chippewa Tribe on S.611. The Tribe is comprised of the six member Reservations--Bois Forte, Fond du Lac, Mille Lacs, Grand Portage, Leech Lake and White Earth.

S.611 proposes to establish administrative procedures to determine the status of certain Indian groups. This legislation would abolish the current Branch of Acknowledgement and Research in the Bureau of Indian Affairs (BIA) and establish a new Indian agency, the "Office of Federal Acknowledgement," in the Department of the Interior, but not in the BIA. The new agency would pursue an "independent administrative process" to expedite Federal recognition of "any aggregation of Indians" that can meet the bill's criteria for qualification as an Indian tribe. The criteria are so broad it is difficult to see how any group--unless it is probably 100% non-Indian--could fail to qualify for acknowledgement.

Fundamentally, we are opposed to the enactment of this measure on the grounds it would abolish long-standing historical, legal, political and cultural criteria which have served as threshold tests in determining a group's claim for acknowledgement as a tribe. Moreover, the "definitions" proposed in this bill appear lenient enough to permit--among others--scattered indian descendants, family groups and an organization of indian individuals to qualify for acknowledgement as "Indian Tribes." In addition, the bill would make acknowledgement possible for several groups whose claims have previously been denied administratively, judicially, and/or legislatively.

We believe it is important in light of S.611 to focus on the meaning and importance of "acknowledgement" in the Indian field. Simply stated, the acknowledgement of an Indian group as a tribe brings it into the family of Federally-recognized tribes where it will enjoy a unique relationship with the United States, including all of the attributes and special programs and services that flow therefrom. Significantly, this unique relationship can be terminated only by an Act of Congress.

The Minnesota Chippewa Tribe values its standing as a Federally-recognized tribe within the context of Federal-Indian relations and the attributes which accompany such standing. For example, we vigorously defend our inherent sovereign powers that make it possible for the Tribe to exercise governmental powers over our territory and members. By virtue of such powers, we maintain government-to-government relationships with Federal, State and local units of government on a range of issues from social welfare services to the complex management of valuable natural resources. I might add parenthetically that through this government-to-government relationship, the needs of both our tribal members and non-Indians are balanced and addressed.

Recently, the importance of tribal sovereignty was a central issue in the prolonged debate in the Congress and in the courts over the right of Indian tribes to engage in various gaming activities, exclusive of state control and jurisdiction. Congress sought to balance the competing claims by tribes and states to jurisdiction in the area of gaming by enacting legislation (P.L.100-497) in the last Congress.

The point I am trying to make here by emphasizing the importance of inherent sovereign powers is that the sovereign powers of Indian tribes are powers Indian tribes have exercised, defended, and retained over the many years at great cost in lives and land. We see in S. 611 a threat to our sovereign powers. Its broad definitions and lax standards would eventually make a mockery of the very meaning of "Indian tribe" and "government-to-government relationship."

We contend that S.611 has lost sight of the purpose of acknowledgement, and that its focus is on the identification of a group or its members as "Indians" not as a "tribe," and that it would permit the creation of Federally-recognized artificial "Indian tribes" through the use of highly questionable, and unreliable, evidence.

The Minnesota Chippewa Tribe does not take lightly a threat to its sovereign powers. We urge this Committee to take another look at S.611 and carefully weigh the serious consequences that would follow if questionable groups were acknowledged pursuant to S.611 and sought to claim the right to exercise inherent sovereign powers over territory and members. Tribal sovereignty would be greatly weakened and eventually would become practically meaningless.

Briefly, I wish to emphasize further that as a Federally-recognized tribe, the Minnesota Chippewa Tribe is subject to all Federal statutes applicable to Indians; the Tribe's members receive selected services from the Federal Government solely on the basis of their status as Indians; and the United States has assumed a self-imposed legal trust responsibility to protect the Tribe's valuable natural resources and governmental rights. These far-reaching Federal responsibilities turn on our status as an acknowledged "tribe" not as a group of acknowledged "Indian descendants."

The Federal Acknowledgement Process (FAP), the administrative tool presently used by the Department of the Interior to confirm or reject an Indian group's claim for acknowledgement as a "tribe", clearly recognizes tribes and not descendants for Federal-Indian purposes. We strongly endorse the continued use of the criteria underlying the FAP to maintain the integrity of the Federally-recognized tribes' unique relationship with the United States.

I now wish to cite one example where S.611 could have a negative impact on the Minnesota Chippewa Tribe. In a legal memorandum (attached to my statement) prepared by our counsel, Kent P. Tupper, Mr. Tupper notes that S.611 appears to abolish these long standing criteria used to determine a group's claim to be acknowledged as a tribe. Groups who could show they have Indian ancestors could presumably petition for recognition as a tribe. In Minnesota, there are descendants of Chippewas who have been eligible to share in land claim per capita payments but are not eligible for enrollment in the Minnesota Chippewa Tribe because of their lack of a sufficient blood quantum.

In the first half of this century, many Indian people along the U.S. and Canadian border, crossed back and forth freely. Many have descendants now living in the United States and holding American citizenship. Their ancestors had no treaties with the

U.S. and they have no land claims in the U.S. but presumably could now seek recognition as tribes or Bands. Many of these groups have maintained long-standing voluntary associations but have never existed as tribes.

The Tribe and its member bands would vigorously oppose the acknowledgement of such descendant groups under the diluted criteria contained in S.611.

The Tribe is concerned that acknowledgement under S.611 would turn on a group's racial composition rather than its political relationship (government-to-government) with the United States. Significantly, the United States Supreme Court in *Morton* v. *Mancari* (417 U.S. 535) characterized Federal-Indian relations as a "political" rather than a "racial" relationship.

We strongly urge the Committee to maintain the "political" character of acknowledged tribes, and not legislate a procedure that would do violence to this time-honored cornerstone of Federal-Indian relations. Also, we encourage counsel for both the Majority and Minority sides of the Committee to study Mr. Tupper's legal memorandum.

Mr. Chairman, Indian groups that have legitimate claims for recognition should be recognized. But we insist that such recognition be predicated on the present criteria, 25 CFR 83.7, underlying the FAP. We see no justification for diluting this criteria and opening up serious legal and public policy complications for recognized tribes and the United States.

The Minnesota Chippewa Tribe and other Federally-recognized tribes have a legitimate interest and stake in the outcome of S.611, therefore, we ask that there be no rush to judgement on this measure by the Committee. Specifically, we request that the hearing record remain open for an extended period of time to permit the proponents and opponents of S.611 to submit testimony for the record.

Also, we have only recently learned of Senator McCain's bill on this subject. Speaking as an individual, it appears to embody the concepts on acknowledgement that I could support and I am prepared to endorse it as an individual conditioned on a more formal review by the Tribe reserving the right to offer amendments. Based on these circumstances, we recommend further hearings on both bills here in Washington, D.C., and in the field.

In conclusion, Mr. Chairman, we want to play a constructive role in the acknowledgement issue. We want to support a process that is timely for petitioning groups and one that maintains the present criteria (25 CFR 83.7) to insure that the uniqueness and integrity of Federal-Indian relations is upheld.

PREPARED BY KENT P. TUPPER, ATTORNEY AT LAW

The United States Constitution in Article I, Section 8, Clause 3, the Indian Commerce Clause, expressly grants to Congress the power "to regulate Commerce . . . with the Indian Tribes." Congress has never enacted a single statute defining an Indian Tribe for all purposes. However many federal statutes and federal regulations use that term.

Tribal existance can be determined in most cases by refering to a treaty, statute, agreement or an executive order that has recognized a tribes' existence. It was necessary for the United States in earlier days to determine which Indian groups were political entities that could be negotiated with for the purpose of entering into treaties that could deal with land acquisition by the United States government.

The United States Supreme Court suggested a limit on the power of Congress to define tribal status in United States v. Sandoval, 231 U.S. 28 (1913). The court states:

> ... it may be taken as the settled doctrine of this court that Congress, in pursuance of the long established policy of the government has a right to determine for itself when the guardianship which has been maintained over the Indians shall cease. It is for that body, and not the Courts, to determine when the true interests of the Indian require his release from such condition of tutelage!
>
> Of course it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe, but only that in respect of distinctly Indian Communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts. (underlining supplied)

That noted Indian law commentator Felix Cohen discussed the legal status of Indian Tribes in his well recognized Hornbook on Indian law, Federal Indian Law, at p. 270 where he states:

> The question of what groups constitute tribes or bands has been extensively consider in recent years by the administrative authorities of the Federal Government in connection with tribal organization

> effected pursuant to section 16 of the Act of June 18, 1934. A showing that the group seeking to organize is entitled to be considered as a tribe, within the meaning of the act, is deemed a prerequisite to the holding of a referendum on a proposed tribal constitution, and the basis for such a holding is regularly set forth in the letter from the Commissioner of Indian Affairs to the Secretary of the Interior recommending the submission of a tribal constitution to a referendum vote. In cases of special difficulty, a ruling has generally been obtained from the Solicitor for the Interior Department as to the tribal status of the group seeking to organize. The considerations which singly or jointly, have been particularly relied upon in reaching, the conclusion that a group constitutes a "tribe" or "band " have been:
>
> (1) That the group has had treaty relations with the United States.
> (2) That the group has been denominated a tribe by act of Congress or Executive order.
> (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
> (4) That the group has been treated as a tribe or band by other Indian tribes.
> (5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.
>
> Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the special solidarity of the group.

Cohen further elaborated on the elements needed to recognize the existence of a tribe or band at p. 271 where he quoted the Solicitor in passing on the status of the Miami and Peoria Indians.

> It is not enough that the ethnographic history of the two groups shows them in the past to have been distinct and well-recognized tribes or bands. A particular tribe or band may well pass out of existence as such in the course of time. The word "recognized" as used in the Oklahoma Indian Welfare Act involves more than past existence as a tribe and its historical recognition as such. There

> must be a currently existing group distinct and functioning as a group in certain respects and recognition of auch activity must have been shown by specific actions of the Indian Office, the Department, or by Congress.

The distinction between a band or tribe and a voluntary association or society is at times difficult to draw with precision. The Acting Solicitor for the Interior Department, ruling that a particular group could not be considered a tribe or band for purposes of organization under the Oklahoma Indian Welfare Act Declared:

> The primary distinction between a band and a society is that a band is a political body. In other words, a band has functions and powers of governement. It is generally the historic unit of government in those tribes where bands exist. Because of Federal intervention aimed to destroy tribal organization many recognized bands have lost most if not all of their governmental functions. But their identity as a political organization must remain if the group of Indians can be considered a band or tribe.
>
> This character of band as an existing or historical unit of Indian government seems to be recognized in sections 16 and 19 of the Indian Reorganization Act which refer to "powers vested in any tribe or tribal council by existing law." and define tribe to include an "organized band." In the administration of the act, organizations of tribes or bands have included such limited powers of government as remain and are considered appropriate. It is this feature which distinguishes organization under section 3 of the Oklahoma Act from organization of voluntary associations under section 4.

S.611 - Indian Federal Acknowledgement Administrative Procedures Act of 1989 would appear to abolish these long standing criteria used to determine a groups claim to be acknowledged as a tribe. Groups who could show they had Indian ancestors could presumably petition for recognition as a tribe. In Minnesota there are Indian descendents of Chippewas who have been eligible to share in land claim per capita payments but are not eligible for enrollment in the Minnesota Chippewa Tribe because of their lack of a sufficient blood quantum.

In the first half of this century many Indian people along the U.S. and Candian border crossed back and forth freely. Many have descendents now living in the United States and holding American citizenship. Their ancestors had no treaties with the U.S. and they had no land claims in the U.S. but presumably could now seek recognition as tribes or Bands. Many of these groups have maintained long standing voluntary associations but have never existed as tribes.

S.611 seems to accept a racial basis for determining a groups desire to be recognized as a tribe rather than the political relationship it had had with the United States government as set forth by the Court in Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474 (1974). The court there pointed out at p. 2483

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituancy of tribal Indians living on or near reservations. . . .

and at p. 2484

> . . . the preference as applied, is granted to Indians not as a descrete racial group, but, rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . .

Tribes or bands that have legitimate claims for recognition should be recognized. The automatic acknowledgement of claims because of the failure to meet the deadlines in the act could result in harm to the legitimate tribes, who would be barred from participating in the recognition process pursuant to provisions in S.611.

The Indian Reorganization Act of 1934, 25 U.S.C. 476, provides for organization of "Any Indian Tribes, or tribes residing on the same reservation, shall have the right to orgainze for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such contitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as herein provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws."

"In addition to all powers, vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the office of Management and Budget and the Congress."

It appears that S.611 will establish new criteria for acknowledging tribes by the Federal Government and that could weaken the government to government relationships between existing tribes and the federal, state and local governments in ways that may not be apparent to the authors of S.611. The newly recognized "tribes" would certainly seek all of the programs and benefits obtained by existing tribes. A further division of the already insufficient programs available to existing federally recognized tribes would only further weaken and undermine the hard fought gains made by existing tribes in the past two decades.

# STATEMENT OF
# N. BRUCE DUTHU, ESQ.
# OF THE
# UNITED HOUMA NATION, INC. OF LOUISIANA

## INTRODUCTION

Mr. Chairman and members of the Committee: Thank you for the opportunity to present this written testimony on behalf of the United Houma Nation, Inc. My comments will focus on S. 611 and its potential impact on our tribe's ongoing efforts to obtain federal recognition. It is my hope that these written remarks will supplement and not duplicate the verbal testimony the Committee will hear from Ms. Helen Gindrat, the Houma's vice-chair.

## HOUMA'S PETITION FOR FEDERAL RECOGNITION and S. 611:

Senate Bill 611 attempts to respond to a very real problem: how to process fairly, equitably and expeditiously petitions of tribal groups seeking federal recognition. The Houma Tribe has had its petition filed with the BIA since July of 1985 and it has not even progressed to the stage of active consideration.

As an attorney practicing in the state and federal courts of Southeastern Louisiana, I came to know well the frustration of advising clients that there might be considerable delay in securing their "day in court." Clogged dockets, procedural roadblocks, frivolous motions - all seemed like very poor excuses to explain the delays. To clients, it seemed the merits of their case did not matter at all. Justice delayed, did in fact, become justice denied.

Delaying justice for my former clients meant that one person or one family did not get a full and fair hearing on their legal rights. Delaying justice in the case of the Houma has meant that an entire nation of people have not received a full and fair hearing on their legal rights. It is just as difficult to explain the delays to a tribe as it is to an individual; after all, as Justice Marshall wrote in **McClanahan** (v. Arizona State Tax Commission, 411 U.S. 164), a tribe is "composed of individual Indians."

I should point out, if it is not clearly obvious, that I regard the United Houma Nation as a distinct Indian nation, possessing all the attributes of inherent sovereignty that is accorded "federally recognized" tribes. These were not terms I grew up with in Dulac, Louisiana. I learned them in law school and in the practice and teaching of federal Indian law. What I knew as a child was that I was an Indian, a Houma Indian. What I did not know was that I was not an "official" Indian.

The entire process of seeking federal recognition still perplexes me. For those of us well aware of the vicissitudes of federal Indian policy, we know that Congress has never really made up its mind as to whether Indians and Indian tribes should be assimilated into "mainstream" American society or be accorded what Charles Wilkinson describes as a "measured separatism." (Wilkinson, American Indians, Time and The Law, page 14). When one looks at the major criteria for "proving" Indian status, it becomes painfully obvious that what is expected is proof that tribal people have overcome, outlived or outsmarted every attempt (by government and/or private entities/individuals) to "de-Indianize" Indian people. For example, proof must be made of habitation of a specific area by a substantial portion of the petitioning group. Yet, the Houma historical record recounts events of forced dislocation. These events notwithstanding, there is strong historical and anthropological evidence to support the Houma on this element of proof.

My personal perplexity aside, I view the current process of recognition as at least one feasible means to establish (or restore) the government to government relationship between the United States and the Houma Nation. And I view Senate Bill 611 as a positive step to ensure fair and expeditious handling of the tribe's petition for recognition.

## THE FLOODGATES ARGUMENT:

Opposition to this bill may rest on the argument that "tribes" will come out of the woodworks to press claims of Indian tribal status. The federal "pie" for Indian programs would thus be carved up into smaller slices to accommodate these newly recognized creatures.

This argument ignores several key points. First, the bill does not lesson the standards of proof required of petitioning groups to establish recognition. In the case of the Houma, we gain nothing by this act except the promise of a more expeditious processing of the claim. Our burden of proof remains just as high.

Secondly, the criteria seem calculated to eliminate the possibility that a newly organized "community" of people could band together and petition for recognition as a tribe. Critics could, for example, argue that the Houma should not be recognized simply because the tribe did not formally organize until the 1970's. In fact, the historical record suggests that the tribe's political organization extends much further back. Additionally, there is extensive proof of the tribe's historical identification as an Indian tribe by governments, other tribes and by scholars.

As I mentioned, I had a clear sense of my Indian identity while growing up. The social and cultural environment I was exposed to was overwhelmingly Indian. Utilizing the services of traditional healers ("traiteurs" in our adopted French language), living in closely-knit extended family settings, passing on important elements of our folklore, preserving the adopted language of the tribe ('Cajun French) - all were aspects of our culture which surrounded me and influenced me. I suppose I first realized how distinct these attributes were when our school systems were integrated in 1969. Prior to that year, Terrebonne Parish (or county) operated a tri-partite school system - schools for whites, a school for blacks and the Dulac Indian School for us. In 1969, I attended school for the first time with white and Black kids. I was in 6th grade.

I remember my non-Indian schoolmates being somewhat intrigued by our background and our culture. Of course, we were enigmatic as well in the sense that we did not sport traditional braids or wear feathers as part of our customary dress. We did not "fit" their mold of the "real Indians."

As I grew older and learned to ask more questions, there was no doubt that our tribal members had long been treated as a separate and distinct people. Unfortunately, in southeast Louisiana, this distinction carried with it no favors. Distinctive treatment, I learned, was the euphemistic expression for prejudice and discrimination. After all, that's why we had separate schools, rode in the back of the bus, sat in certain sections of the Catholic church and played with certain friends. Jim Crow got around and stuck around longer than most people think (or would like to remember).

Finally, there is an important aspect of the floodgates argument that strikes me as defeatist, especially if advanced by other recognized tribal groups. To argue against this bill on grounds that it will shrink the pool of available federal dollars for Indian programs is to accept, at least tacitly, the notion that tribes will be perpetually dependent upon the federal government. It ignores the significant advances made by some tribes in asserting their sovereignty (witness the effective use by some tribes of their sovereign power to tax). As I appreciate the message of our leadership in the Houma Nation, we see federal recognition as the means out of "dependency" and into the status of a truly self-governing, self-determining nation. As Kirby Verret, the Houma Tribal Chairman, articulated in his statement to this Committee last year, ". . . our only way to achieve equality is through federal recognition."

The obstacles facing the Houma people are no different and no less imposing than those facing most tribal groups. High unemployment among the Houma has been exacerbated as a result of the downturn in Louisiana's oil industry. Alcoholism is widespread in several communities. Educational attainment is incredibly low and most Houma youth are still dropping out before reaching high school.

I've written before that federal recognition is not the cure-all for the Houma's present-day problems and I accept that there are no guarantees in this process. Still, recognition represents a significant opportunity for change in our community and it is that hope which fuels these efforts.

## CONCLUSION:

While we might engage in spirited debate over the concept and process of federal recognition, I think it wiser to accept for the moment that it represents the most viable means of securing the government to government relationship between the Houma Nation and the United States. Ensuring fairness, equity and deliberate speed in the process is a positive measure and for that reason, I wholly support Senate Bill 611. The provisions as constructed and as applied to a group like the Houma do not open the possibility of a flood of claimants seeking federal recognition given the bill's stringent requirements of proof.

# WRITTEN TESTIMONY OF THE NISQUALLY INDIAN TRIBE BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS CONCERNING S. 611, A BILL TO ESTABLISH ADMINISTRATIVE PROCEDURES TO DETERMINE THE STATUS OF CERTAIN INDIAN GROUPS

MAY 5, 1989

The Nisqually Indian Tribe has serious concerns about Senate Bill 611. The Tribe views this bill as an ill-conceived effort advanced by groups of people having negligible Indian blood to circumvent what little remains of the constitutional procedures required for their recognition as tribes. Senate Bill 611 disparages existing treaties with recognized tribes by ignoring the principles upon which the government-to-government relationship between the United States Government and treaty tribes was founded.

The United States Constitution explicitly governs the relationship between Indian tribes and the federal government. Article I of the Constitution requires that Indian tribes, as sovereign nations, are to be dealt with by treaty through the executive branch, "by and with the Advice and Consent of the Senate...." In 1871 Congress curtailed the constitutionally mandated treaty procedure by inserting a rider to appropriations legislation which terminated the Indian treaty-making power of the President and the Senate. Since 1871 Indian tribes have been dealt with by executive orders, agreements with Congress, and the so-called "Federal acknowledgment Procedure" of the BIA, methods not allowed for under the Constitution.

Senate Bill 611 perpetuates the myth that Congress has "plenary authority" in the so-called "acknowledgment process." First of all, acknowledgment of Indian tribes is a power expressly delegated by the Constitution to the President and the Senate, not Congress. Second, the term "plenary" must be redefined so as not to be misused as it has been in recent years.

The "plenary powers doctrine" was introduced by U.S. Supreme Court Chief Justice John Marshall in 1824, in Gibbons v. Ogden, to clarify the relationship of powers as between the federal government and states to regulate interstate commerce. Marshall described the federal commerce power as being plenary, not to define the depth of the power, but to clarify that as between states and the federal government, the federal government held all those regulatory powers over commerce as were delegated by the Constitution.

Thus, the plenary powers doctrine as applied to Indian tribes means merely that the powers as per relations with tribes that are expressly mentioned in the Constitution are delegated only to the federal government. That does not mean that Congress has plenary authority to alter the constitutionally mandated treaty procedures, which is what Senate Bill 611 would do.

**If Congress is intent on establishing just, clear, and consistent standards for the acknowledgment of tribes, Senate Bill 611 must be rejected entirely and the procedures mandated by the Constitution must be restored.**

## NISQUALLY BUSINESS COMMITTEE
## RESOLUTION NO. 25-1989

### SUBMISSION OF WRITTEN TESTIMONY IN OPPOSITION TO SENATE BILL 611, A BILL TO ESTABLISH FEDERAL ACKNOWLEDGMENT PROCEDURES

WHEREAS, the Nisqually Indian Tribe is the successor descendent entity of the Nisqually Nation signatory to the Treaty of Medicine Creek of 1854 (10 Stat. 1132), and unto this day has retained and maintained its tribal identity, its governing body, and certain sovereign powers; AND

WHEREAS, the Nisqually Indian Tribe is a federally recognized American Indian Tribe organized under its governing Constitution and Bylaws approved by the U.S. Secretary of the Interior on September 9, 1946, pursuant to the Indian Reorganization Act, 25 U.S.C. 476; AND

WHEREAS, the Nisqually Indian Community Council is the duly constituted governing body of the Nisqually Tribe, and the Business Committee the duly elected executive administrative officers and officials of the Community Council by the authority of the Tribe's Constitution and Bylaws; AND

WHEREAS, the United States Senate of the 101st Congress has referred to the Select Committee on Indian Affairs Senate Bill 611, a bill to establish administrative procedures to determine the status of certain Indian groups; AND

WHEREAS, the Senate Select Committee on Indian Affairs has scheduled a hearing on S. 611 for May 5, 1989 and will be accepting written testimony from recognized tribes on S. 611; AND

WHEREAS, S. 611 would perpetuate unconstitutional procedures for recognizing Indian tribes by ignoring that the only method by which the United States may recognize Indian tribes is by treaty with the President with the advice and consent of the Senate; NOW

THEREFORE, BE IT RESOLVED BY THE NISQUALLY INDIAN TRIBE, that the attached written testimony of the Tribe in opposition to S. 611 shall be submitted to the Senate Select Committee on Indian Affairs.

### CERTIFICATION

I certify that the above Resolution was adopted at a regular meeting of the Nisqually Business Committee held on the 26 day of [illegible], 1989, on the Nisqually Reservation, Washington, at which time a quorum was present and voting 5 FOR and 0 AGAINST.

ATTEST:

Dorian S. Sanchez
DORIAN S. SANCHEZ, CHAIRMAN
NISQUALLY INDIAN COMMUNITY

Sheila McCloud
SHEILA McCLOUD, SECRETARY
NISQUALLY INDIAN COMMUNITY

# SUPPLEMENTAL WRITTEN STATEMENT

OF

RUSSEL LAWRENCE BARSH

ATTORNEY FOR THE SAMISH INDIAN TRIBE

ON S.611

submitted to the

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

May 5, 1989

## Constitutional issues

It is a fundamental aspect of the constitutional principle of separation of powers, that administrative agencies must have specific Congressional authority for their activities--and that any delegation of power to them must be accompanied by standards or guidelines. The "FAP" program is unusual insofar as it has neither. At the most, Congress has "acquiesced" in the program by appropriating funds for it, as Senator McCain indicated in his opening remarks. It should be stressed that the program does not even have a separate line item in the Interior Department budget, however. The constitutionality of administrative acknowledgment of Indian tribes will be vulnerable until Congress clarifies the Department's authority and legislates criteria.

In her May 5, 1989 testimony before the Select Committee, Deputy Assistant Secretary Hazel Elbert conceded that Federal obligations to Indian tribes are defined, under the Constitution, by Congress. She nonetheless argued that her office has authority to "identify to whom the Secretary of the Interior owes these obligations." In some instances this may be true. If two tribal councils purport to speak for the same tribe, the BIA must decide with whom to do business. This is quite different, however, than authority to withdraw protection and assistance altogether from a tribe, particularly where Congress explicitly extended that protection to the tribe in the first instance, by treaty or otherwise.

Administrative authority to "identify" the beneficiaries of Federal laws is certainly not a license to overrule the Congress in particular cases.

## The treaty question

Administrative termination of Indian treaties has been one of the consequences of this separation-of-powers problem. BIA witnesses told the Committee bluntly that "we do not see a treaty as recognition." They argued that it is their responsibility, and not that of Congress, to decide whether a treaty has lapsed owing to the physical or political disappearance of the tribal parties.

Interior Department Solicitor Scott Keep tried to justify this position by arguing that the groups in question no longer exist "in the tribal state in the same sense as they did at the treaty." They have changed, evolved, and sometimes dispersed. But this is true of all Indian tribes. None are the same as they were in the 1860s. None are "tribal" in the same way, especially if we use "tribal" in the strict sociological sense of a society governed by kinship rather than formal laws. By Keep's reasoning, Indian tribes on reservations are no more clearly recognized or acknowledged today, than landless "unrecognized" tribes such as the Samish.

## The "FAP" criteria

Interior Department solicitor Scott Keep maintained that the 1978 regulations (25 CFR Part 83) are essentially the same as the criteria previously utilized by the Department. As the attached letters to Congress from Indian Commissioners Butler and Thompson plainly show, Keep's agency explicitly relied, until 1974, on the criteria in Felix Cohen's 1942 *Handbook of Federal Indian Law*, an official Department publication which itself was Cohen's attempt to summarize prior Department practice. Three of the five "Cohen criteria" do not appear in the 1978 regulations--and they are the ones which defer to the constitutional authority of Congress, and respect for the continuity of prior recognition.

A chart is attached comparing the five "Cohen criteria" with the seven criteria currently in use.

## BAR practice

A number of questionable statements regarding current BAR practices were made by Administration witnesses. For example, it was stated that "just the statement" that a petitioner exercises political authority is sufficient to satisfy 25 CFR 83.7(c)--and that BAR would merely "ask questions" if the information was "not stated clearly enough." In the Samish case and others, however, BAR challenged the petitioner to provide detailed evidence that its political organization had been continuous, diversified, and "tribal in character." Samish was rejected, even though it was able to supply tribal council minutes for most years back to the 1930s, as well as affidavits of tribal elders identifying leaders and describing tribal political processes back to the 1910s.

According to BAR chief Lynn Forcia, "no one has been turned down for lack of evidence" of ancestry. This is patently untrue. BAR has consistently required affirmative documentary proof, not only that an ancestor was an Indian, but a member of that tribe. Several large Snohomish families were rejected, for instance, on the grounds that the only evidence of ancestry was long repute in the Indian and white communities. Others were rejected because their ancestors had sometimes identified themselves as Snohomish, and sometimes as members of other tribes. The fact that Salish-speaking tribes always intermarried, and reckoned their ancestry "bilaterally" (from both sides) was totally ignored.

Indeed, it is typical of the Administration position to try to characterize rejected petitioners as "non-Indian." Under the current regulations, a socially-cohesive group consisting wholly of "full-blood" Indians would *not* be eligible for acknowledgment, unless the individuals could document their descent from a particular "historical [i.e., aboriginal] tribe." The issue is tribal identity, not Indian ancestry.

It was surprising to hear Ms. Forcia describe BAR's work as including "assistance" to petitioners. Staff review, investigate and evaluate petitions. To characterize this highly adversarial process as "assistance" is inaccurate and rather cynical. It also disregards some rather serious questions of procedural fairness, since Federal law (5 USC 551 et seq.) generally forbids combining investigative and adjudicatory functions in the same employees.

"Indian tribe"

In her criticism of S.611, Ms. Elbert argued that an "Indian tribe" is characterized by "tribal relations," as opposed simply to the existence of a distinct social organization. It should be noted at the outset that "tribal relations" is not a criterion in the current BIA regulations, which *on their face* merely require that a petitioners' members live in close enough proximity to one another that social interaction is *possible*. In other words, the current regulations are geographical and do not even require the existence of actual social interaction--yet the BIA has told you that the *actual existence* of social interaction is not enough!

A larger problem is the fact that "tribal relations" is not defined anywhere else, either. Presumably they differ from *social* relations generally by being "tribal," but what exactly is that? This is why we feel that S.912, which incorporates this phrase, would make matters far less clear than at present.

Indeed, BAR chief Forcia told the Committee that a "sense of community and social cohesion" would be typical characteristics of an Indian tribe. This is what section 7(c)(2) of S.611 would require, more clearly and rigorously than the regulations now in force. BAR uses the undefined adjective "tribal" simply to leave it unfettered discretion to reject petitioners arbitrarily, even after they have demonstrated social organization.

The root of the Administration position, as I understand it, is that Indianness is not enough to make a tribe. BAR makes much of characterizing the Samish and other petitioners as "groups of Indian descendants" rather than tribes. No one disputes the need to require more of a petitioner than mere ancestry, however. The petitioner should be organized today, form a social organization distinct from others, and show that it has some history. What we object to is the argument that there is some particular, "tribal" form of social organization--undefined and known only to staff at BAR--which distinguishes Indian tribes from "Indian descendants." This is unscientific and fundamentally unfair.*

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* R. Barsh, "A Challenge for Anthropologists," *Practicing Anthropology* 10(2):2, 20 (1988). In the Samish and Snohomish cases, it should be noted, BAR equated "tribal" with *endogamy* (marriage within the group), which was not the aboriginal pattern in our region, nor is it the contemporary pattern on most reservations.

## The S.611 criteria

In our view, witnesses opposed to S.611 offered few concrete examples of potential problems with the clarified criteria.

Administration witnesses characterized sections 7(c)(4) and 7(d)(1)(A) of S.611 as permitting "self-certification" of Indian ancestry by petitioners. In fact, these provisions refer to what is already permitted by 25 CFR 83.7(e)(4): the use of affidavits of tribal elders as *evidence* of ancestry, subject to conflicting evidence. Petitioners' own records would be *conclusive*, under S.611, only if they had been approved previously by the Federal government. An individual who was accepted as having Snohomish Indian ancestors for the purpose of claims judgment distribution in 1975, for example, should not have to prove this again as part of an acknowledgment case in 1982.

Ms. Elbert's contention that a "tribe" must exercise "tribal authority" is somewhat circular, since it is Federal recognition, as a practical matter, which makes it possible for Indian tribes to maintain the geographic integrity of their settlements, and to exercise governmental powers over them. BAR criticized the Samish and Snohomish petitions on the grounds that both tribes, although organized formally for more than sixty years, had devoted most of their collective energies to claims and acknowledgment. Absent a land base, and confronted by withdrawal of recognition, what else were they supposed to be doing? Collecting cigarette taxes? The BAR record on "tribal authority" has been unrealistic and has the effect of punishing petitioners again for the wrongs done to them by the Federal government.

We were shocked by Ms. Elbert's statement to the effect that *every one* of the petitions received by BAR thus far would have to be approved under S.611. This is not only plainly speculative--BAR itself is quick to point out that it has little more than a letter of intent from the majority of petitioners--but suggests a prejudgment that most of these unprocessed petitions are without real merit and *should not* prevail. The proper question is choosing, and consistently applying, a clear standard--not deciding *ad hoc* how many Indian tribes there ought to be.

## Splinter groups

We appreciate the concern, expressed by both the Minnesota Chippewa Tribe and Inter-Tribal Council of Arizona, that Federal acknowledgment legislation should not condone secession from any already-recognized tribe. Such questions should be determined by tribal constitutions, not the Congress--although no tribe should be deaf to internal grievances, or fail to adopt constitutional safeguards to protect internal social or cultural minorities. It is entirely appropriate to ensure that S.611 protects the *status quo* with regard to recognized, organized reservation tribes, and we will be making technical suggestions to Committee staff along those lines.

It is another matter, however, to object to acknowledgment of groups that do not live on a reservation; would not in fact be eligible for, or be admitted to membership by extant tribes; but nevertheless are clearly distinct Indian communities. Some groups which fit this description overlap with reservations in membership, while not in any legal or political sense forming a part of the reservation tribe.

This is the problem in western Washington State. Several so-called "general reservations" were set aside with the intent of moving all of the tribes to central locations. In some cases, the tribes confederated formally. Colville is a clear example of this historical process. In other instances, the individuals who were able to obtain allotments on the reservation organized under the Indian Reorganization Act, while the bulk of their tribes of origin remained separately organized and landless. This was the case of the Tulalip Tribe Inc., which was organized in 1935 by reservation descendants of the Snohomish, Snoqualmie, Duwamish, Skagit, Clallam, Puyallup, and other area tribes. All of these ancestral tribes are still separately organized, and several of them are still Federally-recognized. The formation of the mixed society at Tulalip created a new tribe (not an unusual event in our history) but at the same time did not dissolve the ancestral tribes from which Tulalips had been recruited.

## Appeal process

The appeal process proposed by S.611 is designed to fit the unique character of the evidence which is involved in acknowledgment decisions. These decisions revolve around historical and anthropological judgments, and frequently involve disputes over the reliability of different social-scientific methods. Greater consistency can be achieved through a "peer-review" process than one that is adversarial, legalistic, and unfamiliar with social science research. The Department's internal appellate procedure is also likely to involve lengthier and more costly proceedings than the less formal advisory process in S.611.

## Enforcing deadlines

There was widespread agreement on the need for alternative mechanisms to enforce procedural deadlines. S.912 gives the BIA a 6-year grace period, after which the petitioner can litigate the matter *de novo* in Federal court. This might encourage the BIA to let difficult petitions ride, with the effect of simply adding 6 years to the time it will take to resolve these cases.

A better approach might be to strengthen petitioners' right to bring *mandamus* to compel the government to meet its deadlines, by covering the costs of such actions when they are successful. Section 7(c) of S.912 would cover the cost of successful appeals.

Application of the same principle to interlocutory *mandamus* would help encourage prompt, on-schedule administrative decisions. The failure of petitioners to bring any kind of legal action against BAR in the past is almost certainly due to financial reasons.*

Finality

The issue of finality, urged upon us by Senator McCain, is a difficult one. As a general principle, of course, the aim of all legislation and adjudication should be to settle disputes, not to perpetuate them. Disputes do not remain "settled," however, until the parties feel that they have been treated fairly. In the case of "FAP," there is widespread agreement that the existing process has been arbitrary, inconsistent, and unfair.

Congress has often acted on the principle that adjudications marred by a systemic injustice should be reopened. Although most Indian tribes were able to litigate their claims against the U.S. in the Court of Claims under special jurisdictional acts in the 1920s and 1930s, few prevailed, and in 1946 Congress established the Indian Claims Commission to replough that contentious field.* Alaska Native land claims were initially rejected by the Supreme Court in *Tee-Hit-Ton* case, but Congress recognized these claims, in principle, in the Alaska Native Claims Settlement Act.

Nor is it clear here *which* decisions are to remain "final." In Washington State a number of tribes which won awards in the Indian Claims Commission in the 1960s, based on their being the present-day successor organizations to treaty signatories. Just a few years later, another court decided that some of them were *not organized*. A few years after that, Congress appropriated the money to pay them under the ICC awards. Which decisions should be treated as "final"--those which say they *are* tribes or those which say they aren't? I think the Solicitor General was right when he told the Supreme Court in one of these cases that, in the end, the decision must still be made politically.

Management issues

Senator McCain expressed concern about creating any unneeded "new bureaucracy." In principle, we agree. The BIA is far too costly already in proportion to the real services it provides to Indians. In the present case we are considering moving an office within an existing agency and protecting its independence, rather than creating a new office. The same total amount of work must be done in either case. S.611 and S.912 both authorize roughly the same total appropriations over the life of the program.

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* The Samish Indian Tribe was finally forced to file a complaint to preserve its right to judicial review of BAR's 1987 determination against it. *Greene v. Lujan*, U.S. District Court, Western District of Washington, Civil No. C89-645.

* R. Barsh, "Indian Land Claims Policy in the United States," 58 *North Dakota Law Review* 1 (1982).

This year the Administration is requesting a doubling of the BAR budget, purportedly so that the unit can complete up to four petitions per year. This is a debatable calculation.*

At last year's oversight hearing, the Administration stated that it spends $68,000 to process an acknowledgment petition. In fact, the average cost of processing petitions thus far has been three times that amount. The Administration's estimate is based on a workload factor of 1.2 professional staff-years per petition (three staffers at 40 percent of annual pay). If this were true, the 6 professionals in BAR should be completing 5 petitions each year, rather than 2. The present process is clearly inefficient. There are at least two management reasons for this. BAR staff are routinely diverted to other tasks at BIA, interrupting their work on acknowledgment petitions. Confusion over the criteria and the resulting demand for ever-greater documentation on each petition further slows the decisionmaking process.

The unit responsible for these decisions must have adequate staff to complete the job within a reasonable period of time, and then "sunset." Cost savings will come from precise criteria, and by insulating the staff from other pressures and assignments--not by spending less each year and thereby dragging out the process.

*Russel Lawrence Barsh*
*Attorney for the*
*Samish Indian Tribe*
*Seattle*

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* At this new level, BAR would complete the *current backlog* of "completed" petitions in two years, but would still need up to fifteen years to process the remaining, "uncompleted" ones.

## COMPARISON OF THE "COHEN CRITERIA" AND THE CURRENT "FAP" REGULATIONS

| ***COHEN CRITERIA:***<br>*(the group must meet at least some of the following five criteria)* | ***FAP REGULATIONS:***<br>*(the group must meet all of the following seven criteria)* |
|---|---|
| 1. TREATY RELATIONS WITH THE UNITED STATES | --- |
| 2. DESIGNATED A TRIBE BY AN ACT OF CONGRESS OR AN EXECUTIVE ORDER | --- |
| 3. TREATED BY THE FEDERAL GOVERNMENT AS HAVING COLLECTIVE RIGHTS IN TRIBAL LANDS OR FUNDS | --- |
| 4. TREATED AS A TRIBE OR BAND BY OTHER INDIAN TRIBES | (A) IDENTIFIED FROM HISTORICAL TIMES UNTIL THE PRESENT ON A SUBSTANTIALLY CONTINUOUS BASIS, AS "AMERICAN INDIAN," OR "ABORIGINAL." |
| 5. EXERCISED POLITICAL AUTHORITY OVER ITS MEMBERS, THROUGH A TRIBAL COUNCIL OR OTHER GOVERNMENTAL FORMS | (C) HAS MAINTAINED TRIBAL POLITICAL INFLUENCE OR OTHER AUTHORITY OVER ITS MEMBERS AS AN AUTONOMOUS ENTITY THROUGHOUT HISTORY UNTIL THE PRESENT |
|  | (B) INHABITS A SPECIFIC AREA OR LIVES IN A COMMUNITY VIEWED AS AMERICAN INDIAN AND DISTINCT FROM OTHER POPULATIONS IN THE AREA AND THAT ITS MEMBERS ARE DESCENDANTS OF AN INDIAN TRIBE WHICH HISTORICALLY INHABITED A SPECIFIC AREA |
|  | (D) COPY OF GOVERNING DOCUMENT OR STATEMENT DESCRIBING IN FULL THE MEMBERSHIP CRITERIA AND THE PROCEDURES THROUGH WHICH THE GROUP CURRENTLY GOVERNS ITS AFFAIRS AND ITS MEMBERS |
|  | (E) MEMBERSHIP MUST CONSIST OF INDIVIDUALS WHO HAVE ESTABLISHED DESCENDANCY FROM A TRIBE WHICH EXISTED HISTORICALLY OR FROM HISTORICAL TRIBES WHICH COMBINED AND FUNCTIONED AS A SINGLE AUTONOMOUS ENTITY |
|  | (F) MEMBERSHIP COMPOSED PRINCIPALLY OF PERSONS WHO ARE NOT MEMBERS OF ANY OTHER TRIBE |
|  | (G) NOT EXPRESSLY TERMINATED |

SMALL TRIBES ORGANIZATION of WESTERN WASHINGTON
P.O. Box 578/Sumner, Washington 98390-0578/(206) 593-2894

# TESTIMONY OF KAREN BONEY
On Behalf of
THE CHINOOK, COWLITZ, DUWAMISH, SNOQUALMLIE
AND STEILACOOM TRIBES OF WASHINGTON
Before the Senate Select Committee on Indian Affairs

MAY 7, 1989

I am Karen Boney, Chairman of the Small Tribes Organization of Western Washington, and the Tribal Council Secretary for the Snoqualmie Tribe. I currently live in Redmond, Washington. Washington's King County is the aboriginal home of both the Snoqualmie and Duwamish Tribes.

I would like to thank Senator Inouye and the Senate Select Committee on Indian Affairs for this opportunity to submit testimony on behalf of the Chinook, Cowlitz, Duwamish, Snoqualmie and Steilacoom Tribes of Washington State.

We cannot say enough in support of the reforms offered in S.611.

There is an urgent need to strengthen and expedite the administrative process and to clarify the eligibility of Indian groups to be acknowledged as Indian tribes.

The tribes in Western Washington have been victimized and held in an administrative limbo by the current BIA administrative process, with its systematic delays, inadequate staffing, and political agenda.

As tribes that have been involved in the process since its planning stages in 1975, we can speak directly to its problems and how S. 611 offers workable remedies.

## Bureau of Indian Affairs vs. an Independent Office

The BIA has an **inherent conflict of interest.** It is set up to act in a fiduciary relationship with currently recognized tribes, to protect their interests. Unrecognized tribes are not part of its mission and may even be seen as a potential threat. As evidenced in the May 26, 1988 hearing, the BIA testified that even though, "...the backlog of petitions indicates that sufficient staff is not available...we have not been willing to make additional resources available to research possible new tribes by reducing programs and services for those tribes we already serve." The rate of completed cases has slowed to only 1.5 per year.

This is the heart of the problem, this administrative process needs to be independent of the BIA. It needs to be in an office that is free to carry out its mission--"the equitable resolution of questions of Indian tribal status"--without bias and without conflicting missions. S.611 sets up such a separate office within the Department of Interior.

S.611 provides "adequate staff and resources to process petitions within reasonable time limitations".

### Petition Review Procedures--Obvious Deficiency and Active Consideration Review--Timelines

The BIA testified that no tribal petition had been waiting more than one year for review. There is considerable art in this statement.

The BIA has significantly deviated from the intent of the published regulations to achieve this effect.

The petition review procedures in sequence call for: a review for obvious deficiencies or significant ommissions, to be followed by a 12 month active consideration of the petition.

The BIA has kept the list of petitions ready for "active consideration" short by issuing not one but a series of "obvious deficiency letters" per tribe. As long as there is an outstanding "obvious deficiency letter", the petition is considered incomplete and not ready for "active consideration."

The current BIA regulations do not address how long a petition can wait for an "obvious deficiency" or "active consideration" review.

Even when a tribe responds to an "obvious deficiency letter", its petition is not placed on the list of petitions waiting for "active consideration." It is subject to another review to see if the petition responded to the "obvious deficiency letter."

Tribes have protested this extra review procedure arguing that this additional review unnecessarily delays the active consideration of revised petitions and extends the length of the petitioning process. In addition, subsequent "obvious deficiency letters" have called for new deficiencies that could have been, but were not identified in prior deficiency letters. Deficiency letters have called for new categories of information not even hinted at in the regulations or guidelines--suggesting a highly subjective review of the petitions.

S.611 addresses these problems by establishing a rational objective set of standards, and defining what constitutes conclusive proof.

Under S.611, a petitioner must be notified in writing of any obvious deficiencies or significant ommission within 90 days of submittal under Sec.7(c). Active consideration begins within 90 days of submittal under Sec.7(c), and within 45 days under Sec.7(d).

Review Procedure--Preliminary Determination

Following the "active consideration" review of the petition, a preliminary ruling on the petition is published in the Federal Register, followed by a comment period for the petitioner and interested parties, and the final ruling.

In 1983 the Snohomish and Samish Tribes (for whom I don't speak) were issued negative preliminary determinations. The denials were based chiefly on a few days of Bureau fieldwork--roughly a dozen interviews in each case. Both tribes sought copies of the interview notes so they could respond meaningfully to this purportedly crucial evidence, and both were denied. After four years of administrative appeals, the Samish were given heavily edited notes; after 6 years the Snohomish still have not seen the evidence used against them.

Under S.611 petitioners must be provided a detailed written explanation of the grounds upon which the preliminary ruling is based. The explanation must include specific findings on each of the criteria and references to all published works, copies of all unpublished documents and research data produced or consulted by the Office of Federal Acknowledgment in considering the petition.

S. 611. provides for an appeal panel to protect a petitioner's right to an objective administrative review, due process, and appeal.

The following is a brief history of the petition review of some petitioning Washington Tribes--in the order that their petitions have and are being reviewed by the BIA.

The Samish Tribe was in the BIA's review process for 8 years. The Samish review delays both directly and indirectly impacted the submission and review of other Washington petitions. Based on the proposed findings against the Samish Tribe, other Washington Tribes delayed the submission of their petitions to develop additional materials. On September 15, 1987, the Snoqualmie Tribe wrote to BAR after its petition review had been postponed twice, "It appears to us that BAR was attempting to postpone the review of the Snoqualmie Petition until after the Samish

Tribe exhausted its legal remedies." The many irregularities surrounding the Samish review have called the fairness of the BIA process into question. The Samish Petition would be fairly reevaluated under S.611. The Samish Tribe first submitted a petition on June 13, 1975.

The Snohomish Tribe has been waiting over 6 years for FOIA materials so it can complete its response to its preliminary determination. The Snohomish Tribe, which is ranked 12th on the priority register of petitioners (based on its initial petition submittal date), first submitted a petition on March 3, 1975.

The Snoqualmie Tribe has been waiting 36 months, since June 12, 1986, for "active consideration" review of its petition. The Snoqualmie Tribe, which is ranked 20th, first submitted a petition on February 5, 1976.

The Cowlitz Tribe has been waiting 26 months, since February 10, 1987, for "active consideration". The Cowlitz Tribe, which is ranked 16th on the priority register first submitted a petition on September 17, 1975.

The Chinook Tribe has been waiting 22 months, since July 1987, for "active consideration". The Chinook Tribe which is ranked 57th, first submitted a petition on July 23, 1979.

The Steilacoom Tribe waited 14 months, from October 1986 to January 1988 for its obvious deficiency review letter. The Steilacoom Tribe which is ranked 11th, first submitted a petition on August 28, 1974.

The Duwamish Tribe has been waiting 18 months for its obvious deficiency review. The Duwamish Tribe which is ranked 25th, first submitted a petition in June of 1977.

We support S.611. We are not seeking recognition to become wards of the state; rather we are seeking recognition of our inherent sovereignty, recognition of our treaty rights. This recognition will afford our tribes a privileged legal status that will make economic development and job creation for our members easier. This type of recognition can only benefit our tribes, Washington state, and America.

The passage of S.611 is a matter of justice, not politics. It is shame that a few tribes are trying to delay the passage of this bill because they are concerned they may have to share the benefits of recognition with other tribes. This argument has no moral or legal merit.

Attached to this testimony is a copy of Forrest Gerard's comments on S.611 made on behalf of his clients, the Tulalip Tribes, Inc.; and a response for the five tribes on whose behalf I speak today.

GERARD, BYLER & ASSOCIATES
1100 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036
(202) [illegible]

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[illegible]

April 7, 1989

# MEMORANDUM

## S.611-Indian Federal Acknowledgement Administrative Procedures Act of 1989

### GENERAL COMMENTS

On March 16, 1989, Senator Inouye introduced S.611, a bill to establish administrative procedures to determine the status of certain Indian groups. This legislation would abolish the current Branch of Acknowledgement and Research in the Bureau of Indian Affairs (BIA) and establish a new Indian agency, the "Office of Federal Acknowledgement," in the Department of the Interior, but not in the BIA. The new agency would pursue an "independent administrative process" to expedite Federal recognition of "any aggregation of Indians" that can meet the bill's criteria for qualification as an Indian tribe. The criteria are so broad it is difficult to see how any group—unless it is provably 100% non-Indian—would fail to qualify for acknowledgement. The acknowledgement of an Indian group as a tribe brings it into the family of Federally-recognized tribes where it will enjoy a unique relationship with the United States, including all the special programs and services that flow therefrom. This unique relationship can be terminated only by an Act of Congress.

The Federal Acknowledgement Process (FAP), is the administrative tool presently utilized by the Department of the Interior to confirm or reject an Indian group's claim for acknowledgement as a "tribe" within the context of Federal-Indian relations. The FAP would be replaced by the provisions of S.611.

This bill would abolish long-standing historical, legal, political and cultural criteria which have served as threshold tests in determining a group's claim for acknowledgement as a tribe. The "definitions" proposed in this bill are lenient enough to permit—among others—scattered Indian descendants, family groups, an organization of Indian individuals, and Native Hawaiians to qualify for acknowledgement as "Indian tribes." In addition, the bill would make acknowledgement possible for several groups whose claims have previously been denied administratively, judicially, and/or legislatively.

In section 4 the term "official roll" is defined to include "any roll, list or census of Indians prepared or approved by the Secretary of the Interior, or by a court or legislatively-constituted tribunal of the United States, including rolls prepared or approved for the purpose of judgment distributions or the allotment of lands held in trust."

This is a particularly disturbing definition because of its significance with respect to its use in the entire legislation. As it is used later in the proposed bill, "official rolls" would constitute "conclusive proof" of Indian ancestry. A Federal census would be considered an "official role." At one point in time, the assignment of race in a Federal census was based on the observation of the census taker, not on any genealogical proof. Now, it is only necessary to declare oneself an Indian to be listed as such. Older Federal census of Indians are notorious for including non-Indians. Judgment distribution and land allotment lists can be based solely on ancestry, having nothing to do with current tribal membership. Thus, a group could use a judgment list or a census to establish the Indian ancestry of a small family or group as a viable petitioner, even though there had never been a tribal relationship. There are other equally disturbing definitions in S.611 that weaken the criteria underlying the acknowledgment process.

S.611 sets up confusing processes that are difficult to follow from an implementation standpoint. Various, and numerous, deadlines seem arbitrary-- and if missed by one day would result in automatic recognition of the petitioning group. Clearly, the bill would change the basis on which the Federal Government acknowledges an Indian group as a tribe. Heretofore, "tribe" has been considered to be an Indian group that has demonstrated continual existence and indentification as an Indian community exercising attributes of sovereignty over its territory and members since the tribe's earliest contact with non-Indians. In this bill, "continual" is defined to permit 50-year gaps in a group's continual existence.

Stated in the broadest terms, acknowledgment under S.611 would turn on a group's racial composition rather than it's political relationship (government-to-government) with the United States. Significantly, the United States Supreme Court in Morton v. Mancari (417 U.S. 535) characterized Federal-Indian relations as a "political" rather than a "racial" relationship.

There are other problems associated with this legislation. For example, claimants (petitioners) would have the opportunity to exercise two options for acknowledgment, section 7(c) and section 7(d). Section 7(d) establishes an expedited process, but, if a claimant fails to achieve acknowledgment under this process, they simply submit their petition for consideration under section 7(c).

Certain provisions in the bill, in effect, bar "interested parties" from participating at critical junctures in the review process of petitions. Thus, a Federally-recognized tribe who would be negatively impacted by recognition of a petitioning claimant would be unable to make or state it's case against the acknowledgement of such claimant. Also, these provisions would preclude a concerned state, county or municipality from participating as "interested parties" in the process.

The bill establishes a series of deadlines for the completion of actions for decisions by the Secretary and the Director of the Office administering the process. An examination of these deadlines indicates that they most likely could not be met, even under optimum conditions, given the burden placed on these public officials. As noted above, failure to meet deadlines would result in automatic acknowledgement of the claimant. Given the public policy implications associated with acknowledgement of an Indian group as a tribe, this avenue to acknowledgement would greatly dilute the integrity of Federal-Indian relations.

Section 5 of the bill establishes an Office of Federal Acknowledgement whose Director, while responsible to the Secretary, would be nominated by the President, with the advice and consent of the Senate. This provision would tend to "politicize" a process that should be immune from political pressures.

Section 6 of S.611 authorizes the Secretary to establish Federal Acknowledgement Appeals Panels consisting of "experienced scholars" in the field of history and anthropology. Such Panels would review findings of the Office Of Federal Acknowledgement. However, the bill fails to establish standards, guidelines or criteria to guide the work of the Panels to maintain a level of integrity in the process. There is no provision made for a legal review of a Panel's preliminary or final rulings. The bill also contains a provision that would permit a petitioner to reject the appointment of one member of a three-person Panel, presumably to secure a replacement more sympathetic to the petitioner's case.

A careful reading of this bill, in light of the definitions it proposes, leaves no doubt of its intent—it is designed to achieve Federal recognition for as many groups as possible. Its focus is on the identification of a group or its members "as Indians," not as a "tribe," and it would create Federally-recognized artificial "Indian tribes" based on the flimsiest of evidence.

S.611 proposes to radically alter the procedures by which the Department of the Interior would process an Indian group's petition for acknowledgement as a "tribe". The bill would allow vital policy decisions relating to acknowledgement to be made on the basis of political, rather than factual, considerations, under greatly reduced criteria, with reduced standards of proof, removing in some situations the burden of proof from the petitioner to the Federal Government to disprove tribal existence. The bill does not provide other "interested parties" an adequate opportunity to submit comments or documentaion in the process. There is a strong likelihood that the actual application of S.611 would overturn Federal Court decisions relating to acknowledgement.

While the present acknowledgement process may be deficient in some respects, the most prudent course of action would be to remedy the deficiencies in the current procedures and provide funding for additional FAP staff rather than risk harming groups with legitimate claims by creating a backlash which could be highly detrimental to their cause.

## SECTION-BY-SECTION DESCRIPTION OF THE BILL

Section 1 provides that the Act may be cited as the "Indian Federal Acknowledgement Administrative Procedure Act of 1989".

Section 2 sets forth the findings of the Congress.

Section 3 sets forth the purposes of the Act.

Section 4 provides the definitions of terms as used in the Act.

Section 5 provides for the establishment within the Department of Interior of an "Office of Federal Acknowledgement".

Section 6 provides for a list of candidates from which will be chosen a panel to review administrative rulings.

Section 7 sets out the guidelines for determining to whom the Act will apply, the standards to which a petition must conform, and two separate sets of criteria by which petitions will be reviewed.

The criteria under subsection 7(c) apply to those petitioners with no substantial history of government-to-government dealings with the United States.

The criteria under section 7(d) apply to those petitioners with a substantial history of government-to-government dealings with the United States, including treaties, specific statutory references, and administrative approval of tribal constitutions.

Any petitioner who meets the threshold standards under subsection 7(d) may elect to have its petition reviewed under either subsection 7(c) or 7(d).

Those petitioners that meet the threshold criteria for proceeding under subsection 7(d) are presumed to have met the criteria for acknowledgement, the burden of proving otherwise shifting to the Department. In order to deter frivolous attempts to petition under subsection 7(d), those petitioners that choose to petition under subsection 7(d) and subsequently fail to meet the threshold criteria will be placed at the bottom of the list to petition under subsection 7(c).

Section 8 sets out time deadlines for rulings, other administrative actions, and for the petitioner's response, and provides enforcement mechanisms which apply to the review of petitions submitted under section 7(c).

Section 9 sets out time deadlines for rulings, other administrative actions, and for the petitioner's responses, and provides enforcement mechanisms which apply to the review of petitions submitted under section 7(d).

Section 10 sets out the procedures and standards for reviewing appeals made by the petitioner.

Section 11 requires the Director to submit to the Congress a report on the status of all petitions currently on file, and an annual report listing all currently acknowledged tribes, all submitted petitions, and an explanatory progress report on all petitions upon which actions have been taken.

Section 12 provides general provisions on the relationship between tribes acknowledged under this Act and the United States and other tribes and other provisions.

Section 13 authorizes a grant within the Administration for Native Americans to support petitioners in their research and tribal functions while their petitions are under review.

Section 14 transfers all pending petitions to the new office, allows for petitioners denied under the previous process to reapply, and provides for a transitional period of two years with some modified time deadlines.

Section 15 authorizes appropriations necessary to carry out the provisions of this bill.

A copy of S.611 is enclosed for your review and study. We suggest that you communicate with your congressional delegation expressing your views on S.611.

We shall keep you informed on further developments regarding this legislation.

Encl.

SMALL TRIBES ORGANIZATION of WESTERN WASHINGTON

P.O. Box 578/Sumner, Washington 98390-0578/(206) 593-2894

This paper responds to the April 7, 1989 memorandum being circulated by Forrest Gerard on behalf of its client the Tulalip Tribes, Inc. opposing S.611 Federal Acknowledgment Administrative Procedures Act of 1989.

In the Gerard memorandum, S.611 is wrongly protrayed as radically altering the current procedures by which a petition for acknowledgment is processed. It wrongly states that the "criteria" and "definitions" are so broad and lenient that "any aggregation of Indians" could qualify as an Indian tribe. And it wrongly characterizes the bill as "politicizing" the process and barring the participation of "interested parties" in the review process.

"Criteria"

The required "criteria" under a section 7(c) review are substantially the same as those currently being used by the Bureau of Indian Affairs (BIA).

"Deadlines"

The petition review procedures under section 7(c) are substantially the same as those currently being used by the BIA.

They include in sequence: a review for obvious deficiencies, active consideration of the petition, a preliminary ruling on the petition is published in the Federal Register, a comment period for the petitioner and interested parties, and the final ruling.

The only significant changes are that challenges by an interested party (and unreconciled petitioner challenges) are reviewed by an appeal panel. Additionally, deadlines are enforced. The final decision is still made by the Secretary of the Interior.

Review procedures under section 7(d) do not include a review for obvious deficiencies.

"Any aggregation of Indians"

The Gerard comment that "...it is difficult to see how any group--unless it is probably 100% non-Indian--could fail to qualify for acknowledgment" is without merit.

Required criteria demand that, "Substantially all of the current members of the petitioner are descendants of members of the historical Indian tribe with respect to which the petitioner bases its claim for acknowledgment. ."

"Definitions"

Under S.611, the definition of what constitutes evidence of descendancy from a historical tribe remains essentially the same as under the current BIA regulations.

Current BIA regulations state that "Evidence acceptable to [illegible] prepared by the Secretary for the petitioner for the purposes of distributing claims money, providing allotments, or other purposes..."

S.611 restates the same, "Official rolls constitute conclusive proof of ancestry." The term "official roll" means any roll, list or census of Indians prepared or approved by the Secretary of Interior...including rolls prepared or approved for the purposes of judgment distributions or the allotment of lands held in trust."

The intent is the same--the change in language does not weaken the criteria.

"Interested Parties"

As under the current BIA regulations, other "interested parties" have an opportunity to comment or submit evidence after the preliminary determination is published.

"Politicizing the Process"

The Tulalip Tribes, Inc. has benefited by the continued delays in the review process. Its challenges to S.611 are without merit and appear to be aimed at nothing more than delaying the passage of the S.611.

At the May 26, 1989 oversight hearing, the Tulalip Tribes, Inc. recommended the status quo--no changes in acknowledgment procedures and no increases in staffing.

Now, the Gerard memorandum recommends "to remedy the deficiencies in the current procedures and provide funding for additional FAP staff". That is what S.611 does.

"Tulalip Tribes, Inc."

The Tulalip Tribes, Inc. has for years opposed and lobbied against the federal recognition of any more tribes in Western Washington. It should be noted these efforts have not always been successful.

In 1975, the Commissioner of Indian Affairs of the Department of the Interior found no merit in the Tulalip's opposition to the acknowledgment of the Stillaguamish and other small tribes in Washington state.

"In your letter you allege that the Stillaguamish have no political organization or Governmental authority over the membership;...that they have no contact with each other except for the purposes of pressing a claim against the U.S. before the Court of Claims. The Stillaguamish, in their petition...submitted substantial evidence that all of these factors do, in fact, exist.

You...note that the Stillaguamish are of various degrees of Indian blood related to the treaty Tribe descendents; that they do not reside on or near a reservation or within a defined territory; and that they are organized as a non-profit corporation....None of these factors have any bearing upon a decision regarding Federal recognition."

"...you assert that the Tulalip Tribes, not the Stillaguamish are the successors in interest to the Stillaguamish....we have been unable to substantiate your assertion."

"You further state that recognition would make Judge Boldt's decision impossible to administer, and that such recognition would reduce Federal services....In our opinion, it would not be equitable or legal to establish a policy of not recognizing deserving Tribes...on the basis that it would reduce benefits and services for other more fortunate Tribes who have enjoyed that recognition and the attendant benefits for a number of years."

Mr. Gerard was the Counsel on Indian Affairs for the Committee on Interior and Insular Affairs at this time and aware of the Stillaguamish case. Attorney Lewis Bell represented the Tulalips in 1975--continuing as Bell & Ingram in 1989.

Amazingly--14 years later--we find the Tulalip Tribes, Inc. and its consultants are still promoting the same meritless arguments.

It is not legal to deny a legitimate claim for acknowledgment based on whether or not a currently Federally-recognized tribe, state, county, or municipality is impacted by the acknowledgment of a petitioning tribe.

This Tulalip argument is without merit and is not supported by the state.

"It is our belief that you have a right to a clear, unbiased, timely, and non-capricious or arbitrary system for acknowledgment based entirely on historical fact and not on the support or non-support of any state or tribe. This is your right and we support it in full. (Office of the Governor, November 22, 1988).

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The Tulalip arguments against S. 611 must be viewed in their historical perspective. Without regard to the legitimate claims of tribes throughout the country--the Tulalip Tribes, Inc. have, are, and will continue to oppose and delay the acknowledgment of any more tribes in Washington state.

## PHILLIP MARTIN, CHIEF
## MISSISSIPPI BAND OF CHOCTAW INDIANS

I am pleased to be able to submit this written testimony for the Committee's use in its consideration of S. 611, the proposed Indian Federal Acknowledgement Administrative Procedures Act of 1989, on behalf of the Mississippi Band of Choctaw Indians, a federally-recognized tribe of some 5,000 members on 21,000 acres of reservations land in the east central part of the state of Mississippi. I am the elected Chief of the tribe, which was basically recognized by the legislative branch of the federal government through the Interior Appropriations bill in 1918.

I share the concerns of those with petitions pending about the detailed nature of the current acknowledgement process and its heavy dependence on documentation, I can also understand the reason the federal government is, and should continue, requiring it. As the Bureau has stated, the process involves the creation of a *perpetual commitment*, a permanent relationship which should not be entered into either haphazardly or casually. There should be more than sufficient documentation to prove to a reasonable person that the tribe claiming to be a tribe is actually a tribe, considering that the federal government is forming a bond, which includes a monetary commitment, on behalf of all of its citizens, that will last for all time.

I do, however, heartily concur with the objections expressed by petitioners about the lengths of time involved in reviewing these petitions, and agree with the idea that the FAP staff, which in the Bureau or outside of it, should be expanded.

Although the time needed to review each individual petition will remain lengthy, the sooner the status of all of these petitioning groups is determined, the better for everyone.

We are well acquainted with the substantial delays in the process because a group of Choctaws, those at Jena, Louisiana, are one of the groups experiencing those delays. We know definitely that they are Choctaws -- they speak the language and we even know which of the seven current Choctaw communities they came from. But they have been waiting for their recognition for this whole decade.

The expansion of the FAP staff need not be tremendously costly; and the Bureau might consider arranging some sort of cooperative network of anthropologists and graduate students who might be interested in donating their time to one or several petitions.

In looking at the bill, I was puzzled by the "two-track" approach used in S. 611 for federal recognition, the first, section c, practically identical to the present Bureau criteria (based on the recommendation of the American Indian Policy Review Commission, of which I was a task force member), the second based on the existence of prior federal actions; until I read the hearing transcript from May of 1988. But it still occurs to me, if the only groups that need this type of assistance are those like the seven landless tribes of western Washington, terminated tribes, and the two Alaska Native Villages left off BIA's list of tribes, why not add these items to a single acknowledgement process, to produce a single list of institutions that are considered federally-recognized Indian tribes? It simply looks fishy having two separate processes aimed at a single end. It will lead to troubles later on if there are "c" tribes and "d" tribes -- most likely trouble *between* the "c" tribes and the "d" tribes.

I recently reviewed a draft copy of a bill, with an emphasis on "recognition" rather than "acknowledgement" to be introduced by Senator McCain. I believe this a distiction that should be made. Senator McCain's bill, I believe, has the advantage of not dividing the recognition process into two tracks, and of establishing a definite time limit within which the overall recognition process will take place.

Finally, I must add that although S. 611 is structured to avoid a question, that question still lingers and cannot be dismissed, the question of the recognition of the Lumbee Tribe of North Carolina. Though it is true that the Congress has the right to recognize tribes legislatively, in recent years this right has generally been exercised in connection with a land claim the process for consideration of which has documented the validity of the group's claim to be an Indian tribe. We would be opposed to the Congress recognizing a tribe on some other basis than the FAP-type process. While it is true that the size of the Lumbee population will make, and has made, the acknowledgement process tedious, complicated, and costly, we can expand the FAP office to expedite the process. But I believe it important that the process, whether the one currently in place or another "one-track" Bureau process strengthen through additional funding and with a six- to ten-year time frame for all of its work, be followed by any and all tribes, and especially by the Lumbees (and the so-called Alabama Mowa Choctaws), for whom the historical record at this point appears so ambiguous.

Phillip Martin
Chief

## TESTIMONY OF JOAN AVANT-TAVARES, CHAIRPERSON

## MASHPEE WAMPANOAG INDIAN TRIBAL COUNCIL

Mr. Chairman, the Mashpee Wampanoag Indian Tribal Council welcomes this opportunity to submit written testimony in support of S. 611, the Federal Acknowledgment Administrative Procedures Act. On behalf of my Tribal Council, we praise your tireless commitment to improving the lives of all Indian people. As the Chairperson of the Tribal Council I have prepared these remarks for inclusion in the written record following the hearing on S. 611 on May 5, 1989.

Many of us learned in elementary school that in 1620 the Pilgrims were greeted by American Indians. What many Americans may not know is that the chief who greeted the Pilgrims was Massasoit, the Grand Sachem of the Wampanoags. I and my fellow tribal members are descendants of this great chief and we still live not far from the site of that first encounter, in Mashpee, Massachusetts.

We were here before the founding of America and as the history books depict we bore the brunt of non-Indian expansion in North America. We originally held our own land. To protect lands deeded to the Mashpees by sachems, Weepquish and Tookonchosin in 1665, the Mashpee petitioned the Massachusetts Bay Colony and the English Crown to guarantee that this land would be held in perpetuity for our members. The General Court did so and this may be viewed as one of the first Indian reservations in the United States.

While we continued to govern our own affairs, the colonial government appointed guardians for each of our settlements and they had the power to take and distribute our lands to members and even outsiders. Because settlers continued to encroach on our lands and the colonial government refused to protect our tribe, we appealed to the King of England personally. This visit to England prompted a change in colonial policy such that Mashpee became a self-governing district in 1763. The next dramatic change in our affairs and self-government came in 1869 when citizenship was granted to us by Masssachusetts and our land divided in fee simple. Within the following year, our district was abolished and incorporated into a town. This was done without federal Congressional approval. While we dominated the town politics holding virtually every town position, we were losing our land.

Throughout the nineteenth century, and early decades of the twentieth century, political power moved, almost as a matter of succession, through a limited number of families. Coexisting with the town organization which we controlled was an informal tribal leadership that made important decisions for the town. In the early 20th century our tribe went through a revitalization period that reinforced our tribal identity through pow-wows, ceremonies and dances.

World War II brought us sharply into coexistence with increasing numbers of non-Mashpees who began building summer cottages along the bay areas. Mashpee land was taken for an Air Force base which further increased the surrounding population. Following the war, Mashpee the town, found itself a prime target for development. The town's population increased from 434 residents in 1940 to 867 in 1960. Our once

Mashpee- controlled town began to give way to non-Mashpees and in 1974 we permanently lost control of town government. This polarized the community into white and Indian, with each side voicing differing interests and concerns. Around this time we formally created the Mashpee Wampanoag Tribal Council largely in response to our loss of control of town affairs. We were also being threatened by the loss of what little land we had left and the loss of our once free and unlimited access to aquatic resources and hunting and fishing.

This brief history I have provided demonstrates that we have been a continuing self-governing Indian community since first white contact. Even though we never were federally recognized, we have had the experience of controlling a town as a means of tribal self-government and protection of our members, as well as, maintaining a traditional tribal council.

Mr. Chairman, I would like to focus the rest of my remarks on the Mashpee trial. We are perhaps the only tribe that has had a jury determine that we were not a tribe at certain points in time. In Mashpee v. Town of Mashpee, 447 F. Supp. 940 (Dist. Mass. 1978), we brought suit against the town because of violations of the Non-Intercourse Act. We based our suit on the 1869 act of the General Court which granted citizenship to the Mashpee, and which released the restraints on alienation of land, imposed originally in the 1685 deed and carried forward in the 1842 Act. We also based our claim on the 1870 act which incorporated Mashpee into a town and transferred our common land, about 3,000 acres, to the town.

I would like to elaborate on our case. In *Mashpee Tribe* the jury based its decision on the instructions of the court which were answered by mere "no" and "yes" responses. Our attorneys strenuously opposed the jury instructions as being inconsistent and creating jury confusion. For example, the finding of the jury that the Mashpee were *not* a tribe in 1790 is inconsistent with the jury finding that they were a tribe in 1834, but *not* a tribe in 1976. Yet, the judge instructed the jury that tribal status once abandoned could not be regained. If that's the case then we should not have been a tribe after 1790, but even the jury found that we were. Further, the jury's determination was based on a court record that had *no* evidence introduced concerning life in Mashpee between 1870 and 1920. Yet the jury stated "no" in response to the question of whether the Mashpee were an Indian tribe in 1869 and 1870. How could they make that negative finding when they did not have the evidence before them to make that determination?

While the jury found against Mashpee on the basis that our tribal council did not function independent of a town, our "cousins," the Gay Head Wampanoags, were federally recognized on that very same basis because they had continuing political influence through a town government. This contradiction in result, illustrates that a judicial process unfairly penalizes a tribe because lay people and judges do not have the training nor expertise to make decisions on tribal existence.

We therefore, very strongly support the language in your bill that would allow a group to submit a petition even though it has been subject to a negative determination by a court. The court proceeding in our case was a sham. The Mashpee should be allowed to go through the federal acknowledgment process because the Part 83 regulations were promulgated a year after the 1977 jury determination. Consequently, we were never afforded an opportunity for the proper body, the then Federal Acknowledgment Project, to determine federal recognition. Our case attests to the fact that a jury and a court can produce an ambiguous determination of tribal existence that does not resolve the matter. Nothing prohibits the Mashpee from now going through FAP and this status-quo should be maintained in S. 611.

Mr. Chairman based on our experience of having gone through a forty-day trial and having a non-Indian jury determine we are not a tribe, we urge you to pass S. 611 and to not leave such federal recognition questions to the courts. First, we feel that non-Indian jurors may be inherently prejudicial to a group's case. They may be from the area and be virtually an interested party. Second, the jury and even the judge are unqualified to be making a determination of tribal existence which must be derived from complex historical and anthropological evidence and the careful weighing of those facts. And third, litigation such as ours, further separates the Indian and the non-Indian community. Both our communities still suffer the consequences of our case. No other Indian group should be subject to what we went through.

The Mashpee, therefore, disagree with the approach taken by Senator John McCain in his bill S. 912. We read his legislation as actually promoting the role of the courts to resolve federal acknowledgment questions.

This is inadvisable. The Mashpee found that in order to litigate, a tremendous amount of resources are expended by both parties. In Mashpee Tribe, the New Seabury Corporation hired the same legal counsel that defended President Nixon during Watergate. They had at their disposal $1.5 million. We had no such funds to match their unlimited resources. We relied on a non-profit law firm, the Native American Rights Fund to assist us. Although S. 912 allows for recovery of attorney fees, from our viewpoint, litigation should be avoided at all costs. The only funds available to us are those from the Administration for Native Americans, but this is for status clarification and not litigation.

Also, litigation because it is adversarial, fuels the animosity in a community between Indians and non-Indians. Due to the 1977 land suit, we are anticipating that Mashpee's petition for acknowledgment faces strong opposition from powerful real estate interests, now well entrenched in our town's government. They will once again feel threatened in our efforts to become federally recognized. I am hopeful the Committee will learn from our experience and instead follow S. 611's approach of administrative review by anthropologists and historians which places a petition under expert review rather than judicial review.

In closing we urge that you vigorously push S. 611 because the improvements of this legislation will ensure that our petition -- to be submitted this summer -- will not take 8-10 years from beginning to end, but will move through a fair and streamlined process.

It is our fear that without clearly established guidelines for the Branch of Acknowledgment and Research, the petition for the acknowledgment of the Mashpee Wampanoags, descendants of the first hosts to European settlers, could be held up indefinitely.

On behalf of the Mashpee Wampanoag Tribal Council, we thank you for allowing us to submit this written testimony.

ORBIS Associates

CASE STUDY OF

# MASHPEE WAMPANOAG TRIBE

## EVALUATION OF STATUS CLARIFICATION PROJECTS
## FUNDED BY ANA FY 1981 - FY 1988

CONTRACT DELIVERABLE NO. 6

CONTRACT NO. 105-87-6000

Submitted to:

Administration for Native Americans
Office of Human Development Services
Department of Health and Human Services
Washington, D.C.

January 15, 1989

1411 K Street, N.W., Suite 200 • Washington, D.C. 20005 • 202/628-4444

# MASHPEE WAMPANOAG TRIBE

## Historical Overview

In 1620 when the Pilgrims landed at Plymouth, the Wampanoags comprised a group of allied villages in eastern Rhode Island and southeastern Massachusetts (including all of Cape Cod, Martha's Vineyard, and Nantucket Island). Although traditional friends and allies of the neighboring Massachusetts Indians, the Wampanoags were long standing enemies of the Narragansett, who were located west of them. This enmity had been accentuated just prior to the Pilgrims' landing, when in 1617 and 1619 epidemics hit numerous Wampanoag communities. Weakened by illness and serious depopulation of their Plymouth community, the Wampanoags had been unable to withstand attacks from the Narrangansetts and had been driven from several islands in the Narrangansett Bay. This may explain the apparent willingness of the Wampanoags to welcome the Pilgrims, perhaps seeing them as potential allies.

In 1621, two Wampanoag leaders, Massasoit and his brother Quadequina, entered into a formal treaty of friendship with the colonists. In spite of occasional threats from individual village sachems, this peace was maintained for over forty years, until after Massasoit's death in 1662. Massasoit's youngest son, King Phillip, eventually assumed leadership of the Wampanoags. In 1675-1676, the uprising called King Phillip's War, which briefly united the Indians in New England against the colonists, ended in Phillip's death and the virtual extinction of a large portion of the Wampanoag people.

Those Wampanoag villages, including Mashpee, that had not joined in King Phillip's War were able to maintain their towns intact. Organized as a *praying town* in 1660, Mashpee was comprised of 50 square miles, representing the largest Indian land holding in southern New England. The community was sometimes referred to as the Mashpee Plantation. Beginning in 1665, the Mashpee Wampanoags governed themselves and had their own courts, trials, and judgments.

In 1763, the Mashpee lands were incorporated as the district of Mashpee. However, in 1788, the State repealed the Wampanoag's right to self-government calling it a failure, and instituted a five-member non-Indian board of overseers. In 1834, a certain measure of self-government was returned. Although the Mashpee Wampanoags were far from totally managing their own affairs, this time the experiment was judged successful. In 1842, most of the approximately 13,000 acres of Mashpee common lands were divided up and distributed in 60-acre lots to individual families.

In 1869, the Act of Citizenship and Alienation, passed by the Massachusetts legislature, made the Mashpee Wampanoags citizens and also alienated their lands, i.e., allowed for the sale of the lands held by Indian individuals and families. In this way, most of the Indian lands were turned over to the town.

In 1870, with the passage of the Massachusetts "Act to Incorporate the Town of Mashpee," Mashpee became a town and commissioners were appointed to divide and sell the common land. From 1871 to 1878, the remaining common lands, except 2,536 acres, were further divided into 187 parcels and sold at public auction for $7,053 (about $2.70 an acre). Most of these lands went to non-Indians. This sale of Indian common land, authorized by the 1870 Act, was in contradiction to the 1790 Indian Non-Intercourse Act of Congress, a fact which ultimately became a key point in the tribe's 1976 land suit.

Despite losing their land, the Mashpee Indians dominated and controlled Mashpee town politics until the mid-1960's. Throughout this time, the distinction between tribal affairs and municipal affairs was often blurred, with leaders of one group also carrying influence in the other. This interlocking relationship of the tribe and selectmen provided a shield which kept outsiders away from the internal affairs of Mashpee for a long time. The tribal government, or shadow government as it was called by outsiders, concerned itself with the town although it had a more communal focus on the tribal people and the actual resources.

However, just before the onset of World War II, the non-Indian population of Mashpee began to slowly increase. In the mid-1970's the Mashpee tribe, the larger of the two remaining Wampanoag tribes, had a membership around 800-900 members in the Barnstable County area alone. In 1955, the population of the town of Mashpee itself was still only 650; by 1986, it had grown to 10,000.

In 1969, the era of Indian control over town affairs came to an end. To control their destiny, the Mashpee Wampanoags were compelled to seek new strategies to retain their rights and heritage. Around 1970, the Mashpee Indian Museum was established under town ownership. Described as a "cultural revolution" for the tribe, the museum provided a meeting place for the Mashpee Indian community. From it sprang the drive to establish the State Indian Affairs Commission. From it also sprang the movement to reacquire tribal lands.

In 1974, the Mashpee Wampanoag Tribal Council was incorporated and, in 1976, testified before the American Indian Policy Review Commission:

> *"We as the Mashpee Wampanoag people, who were among those who first met the Europeans as they came to this part of the world, are fortunate in still being able to retain a foothold on that land here in Cape Cod, and it is a mystery to me how we have been able to do this over these numbers of years . . . [Our] people, who had no appreciation for the legalities, for property rights . . . were given the awesome responsibility in 1870 of being citizens within the State of Massachusetts and were subject to all of those responsibilities such as payment of taxes, the court systems and everything else that goes along with citizenship, when they were not prepared for this. Since that time, the Indian people in Mashpee have lost virtually everything. They have lost their lands. They've lost their language. And today in 1976, the year of our bicentennial, we stand supposedly as people who are completely assimilated into the mainstream of American life. And that is not true."* (statement of Russell Peters, President of the Mashpee Wampanoag Tribal Council)

Others from the Mashpee Wampanoag Tribe spoke:

> *The influx of status seekers, resort people . . . so greatly outnumbered the native population of our town that we are rapidly losing our strength . . . There are approximately 8,000 people in the Town of Mashpee . . . This population increases . . . to approximately 18,000 people [in the summer]. The year round population of native persons in Mashpee is approximately 500. Little by little we can see the various officials that are natives or spouses of natives being forced from office by one political maneuver after another . . . new land owners [are] building houses that range between $50,000 and $200,000 [resulting in] higher tax rates for property . . . the natives in the town [who] own their own personal property . . . cannot afford the high tax rates.* (statement of Amelia Bingham, member of the Massachusetts Commission on Indian Affairs)

Regarding the negative effect on the basic economy, Hazel Oakley, a member of the tribe, explained:

> *The land bought by white people in the 1940's is now being privately developed . . . the Mashpee Indian is unable to get to the bays to fish or onto the land to hunt. There is a dire need to get the fishing and hunting rights back to our people for commercial purposes."*

Increasingly concerned by these developments, the Mashpee Wampanoag Tribal Council approached the Native American Rights Fund (NARF) which in August 1976, on behalf of the Mashpee, filed suit in Federal district court against the New Seabury Corporation (a large developer), the town of Mashpee, and over 100 large landowners in the community. Shortly thereafter the town selectmen retained a nationally prominent attorney to represent them, challenging the plaintiff's claim to being a tribe, asserting that Mashpee Wampanoag bloodlines were racially mixed, that their tribal council did not function as a political body, and that they were not united as a community.

## 1. STATUS CLARIFICATION EFFORT AND ANA GRANTS

Among the Mashpee Wampanoag leadership, the question of whether to seek Federal recognition was raised about the same time the council was incorporated in 1974. At that time there was divided opinion about whether to seek recognition from the Bureau of Indian Affairs (BIA) or to proceed directly to court in a suit to recover land. It is important to remember that the FAP regulations had not yet been published and there had been a favorable ruling in the Maine Indian Land Claims. These factors undoubtably weighed in favor of the Mashpee's selecting the judicial option. Thus, NARF, which had successfully represented the Indians in Maine, was engaged to help press the Mashpee case.

The Mashpee's formal status clarification efforts began with the 1976 suit. Mashpee represents the only case in which the judicial route for status clarification has been fully activated, albeit unsuccessfully (the case was ruled against the tribe in 1978). A 1980 article published in the American Indian Review reviewed the Mashpee court case and concluded that the courts should defer to the U.S. Department of the Interior (DOI) and its Branch of Acknowledgement Research (BAR) to make fair determinations or, at least, to apply the test of tribal existence found in the Federal Acknowledgement Program (FAP) regulations. BAR has indicated that the Mashpee Wampanoags can still petition for recognition under FAP. At this time, the tribe is pursuing the development of a FAP petition using, in large part, the evidence/data gathered while pursuing their court case.

Not receiving any direct Administration for Native Americans (ANA) status clarification assistance, the Mashpee Wampanoag tribe has however benefitted indirectly from ANA funds:

- Since 1987, ANA has provided assistance toward the development of the Mashpee Wampanoag's petition through a portion of a grant to NARF for providing the tribe with special legal and anthropological expertise to assemble the data into a petition.

In the 1976 suit, the defendants in protesting the Wampanoag's claim to the land questioned the existence of the tribe. Arguing that the issue of Mashpee sovereignty was key, the defendants charged that the Indians lacked a separate government and an independent leadership with strong continuous authority over tribal members. The

Mashpee Wampanoags responded by arguing that continuing leadership could be proved by interrelated families, town governors, or tribal councils. Ultimately, the jury was given the task of determining whether the Mashpees were an Indian tribe on any of the following dates: 1790, the date of the Non-Intercourse Act; 1834, when the District of Mashpee was first created; 1842, when the land held in common was broken into allotments; 1869, when restrictions on alienation of land by individual Indians were lifted; 1870, when the remaining common land was transferred to the town for sale; and 1976, when the suit was filed. On January 6, 1978, the jury decided that the Mashpees were a tribe in 1834 and 1842 but not on any of the other dates. The court subsequently sustained the jury's verdict and dismissed the Mashpees' suit. The First Circuit Court of Appeals affirmed the district court, and the U. S. Supreme Court declined review.

In 1982, the Mashpee Wampanoag Tribal Council disassociated themselves from NARF and hired a new attorney, Robert Hahn. Continuing through early 1986, Hahn attempted a number of court filings which ultimately proved unsuccessful. In mid-1986, the Mashpee decided to pursue FAP and the tribal council asked NARF to return to the work on their petition. That same year, the tribe made an unsuccessful attempt at obtaining direct ANA status clarification funding. The assistance Mashpee currently receives through NARF represents the only status clarification support the tribe has ever received from ANA.

Research conducted for the court case has now been applied to the development of the FAP petition. The NARF consultant, Dr. Jack Campisi, who is presently assisting the tribe in completing its FAP petition was also involved in conducting much of the research for the court case. His research dealt with substantiating both (a) the existence of the modern community/tribe and (b) the exercise of political authority by the tribe. During the court case, Dr. Campisi spent about three months on field research and in presenting testimony; furthermore, he estimates his involvement with the tribe's various judicial efforts total nearly a full year of time over the past ten years. Genealogical research for the court case had been conducted by Hazel Oakley, a tribal member, who has served as tribal genealogist and had kept track of tribal membership for some time before the court case. Her research, as updated, is being used in the petition.

The FAP petition was substantially completed by 1984. Submission was delayed, however, partly in anticipation of the ruling by BAR on the petition submitted by the Gay Head Wampanoags. The Gay Head Wampanoags were extended Federal recognition in April 1987. Shortly after this BAR decision, the Mashpee Wampanoag Tribal Council decided in 1987 to once again proceed with their own FAP petition.

In the opinion of many researchers, BAR's decision and findings in recognizing the Gayhead Wampanaog Tribe mark a significant change in the interpretation of the FAP regulations - - specifically, considerably more burden has been placed on the petitioning tribe. For instance, NARF and its consultant feel that the research and presentation drafted in 1984 for the Mashpee community study would have met BAR's previous interpretation of the FAP criteria. Now, however, they feel that more data and details are required, i.e., "thirty pages as opposed to the three pages [prior to 1984]," i.e., the tendency being, prior to the Gayhead petition, for petitioners to give conclusions based on some data, now the presentation of data must be exhaustive and comprehensive that BAR draws the same conclusion. Thus, although a considerable amount of data had already been used to develop the Mashpee petition, more data are now seen as essential.

Through the NARF grant, ANA funds have so far accounted for about 50 days of time for Dr. Campisi and Dr. William Starna, another NARF consultant, on the petition since early 1987. The major focus of research and writing has been on bringing up-to-date the description of the modern community and the Mashpee's political authority. Final updating of data is expected to be completed during 1988 with the final petition anticipated being submitted to BAR in early 1989. ANA funds, through NARF, will be the sole source of support for these activities culminating in the submission of the Mashpee Wampanoags' petition.

## 2. RESULTANT FINANCIAL BENEFITS

Among the indirect financial benefits of status clarification for the Mashpees are the many publications based on the research which has been done. In 1987, the Massachusetts Humanities Committee funded Russell Peter's book. Also, the Indian Rights Association (based in Philadelphia) has given $2,000 for the writing of a book about the case by Jack Campisi and Russell Peters, which is tentatively scheduled for publication this winter. Education materials, specifically the publications *People of the First Light* and the *Mashpee Coloring Book*, are also results of the research. Both of these were funded through U.S. Department of Education grants to the Mashpee School District. The Mashpees' claim to the land in Wellfleet, which had belonged to a Wampanoag woman but was taken by eminent domain by the U.S. Park Service, was ultimately settled when a judge awarded the Mashpees $10,000 compensation. However, this was used to pay attorney's fees in other court actions. Other funds gained, from 1978-1984, by the tribe are:

| | CETA | ANA | U.S. Dept. of Energy | State of Massachusetts |
|---|---|---|---|---|
| 1978 | $54,000 | $54,000 | | |
| 1979 | $61,572 | $66,500 | $19,000 | |
| 1980 | $55,357 | $40,000 | | |
| 1981 | $55,357 | $46,089 | $10,000 | |
| 1982 | $64,724 | | | $19,000 |
| 1983 | $64,771 | | | |
| 1984 | $85,729 | $25,850 | $15,000 | $ 3,000 |

## 3. CHANGES IN GOVERNANCE

The Mashpee case is unique in many respects, especially regarding tribal governance. The effects of status clarification activities on the structure and functioning of the tribal council need to be viewed within the context of *Mashpee Tribe v. New Seabury et al* as well as the events and circumstances that surrounded the land suit.

Although it may appear that the Mashpee tribal council has lost a great deal of ground since the onset of status clarification activities, this is an unfair association. The erosion of Mashpee self-sufficiency preceded status clarification, and was a principal factor motivating the tribe to seek remedies for their lack of Federal recognition. Inevitably loss of the court case was demoralizing for the tribe leaving them feeling vulnerable to reprisals from the Town of Mashpee and other defendants in the suit. New Seabury Corporation, able to afford the same legal counsel as selected by President Nixon to represent him during Watergate, can and has seemingly impeded the Mashpees in their efforts to promote their own economic development and to conduct normal tribal business.

The major significance of the Mashpee case is that, for such groups, it emphasizes the importance of Federal recognition for ensuring self- governance and trust protection for Indian land. As an unrecognized tribe, the Mashpees have been almost completely defenseless against the territorial and political encroachment of non-Indians. In the past 20 years, radical changes and enormous losses have befallen the Wampanoags at Mashpee. The only apparent hope of stemming these problems, and restoring Mashpee control over threatened resources, lies in obtaining Federal recognition, now presumably through BAR.

From 1648 until as late as 1969, the Wampanoags of Mashpee managed to retain a functioning tribal government with authority coterminous with their land. When Wampanoags accounted for the vast majority of the town of Mashpee residents, the tribe had always elected its own people as town selectmen. The town government handled secular matters, and a parallel council attended to spiritual matters. Although State interference often hampered the Wampanoags' political self-determination, this arrangement provided municipal services, stewardship over natural and cultural resources, and a satisfying community life among the large families comprising the tribe.

The sudden influx in the late 1960's of white upper-middle-class residents caused an electoral shift that disenfranchised the Wampanoags, as Mashpee Indian lands were increasingly alienated and the waterways which supplied their livelihood became less accessible and more polluted. The tribal council was incorporated in 1974, in response to growing concerns about what was happening. Although the Mashpee Wampanoags had long had a formal governing body, i.e., the town government, these new circumstances made it necessary to formalize the tribal council as a non-profit corporation. The council currently has 12 members, including a chief, sachem, secretary, treasurer, and historian. Council members serve staggered two-year terms; by-laws call for monthly meetings.

Status clarification has had a somewhat wrenching effect on the Mashpee tribal council. At each step, there have been understandable differences of opinion about how best to pursue tribal goals. At each loss, there have been predictable recriminations and discontent from those who favored a different course of action. These are familiar strains that affect any small community undergoing crisis, but in this context and others involving unrecognized Indian tribes, status clarification becomes a lighting rod. Recent changes in leadership of the Mashpee Wampanoag Tribal Council have tended to occur following critical junctures in the tribe's quest for legal recognition.

There is no indication that the continued existence or viability of the Mashpee tribal government is in any doubt. The tribe sponsors a variety of social, cultural and economic programs, operates an aquaculture enterprise, and owns a 58-acre parcel of land which is being developed as a tribal office and museum complex. Tribal operations are much more difficult and beleaguered than before the land suit, but they have nonetheless continued. More basically, the Wampanoag community at Mashpee is deeply rooted and densely interconnected. The tribal council continues to reflect the communal interests of the Wampanoags, however difficult these may be to define and safeguard under the present conditions.

## 4. RELATIONSHIPS WITH THE STATE AND SURROUNDING COMMUNITIES

Changes in relationships with non-Indians, especially since the onset of status clarification efforts, have been dramatic in the Mashpee case. Again, however, these changes are thoroughly knitted into the conflict over land and resources previously controlled by the Wampanoags. Unlike several other unrecognized tribes, where increased visibility and community participation have led to new respect and improved external relations, Wampanoag assertions of tribal identity have been met with hostility and, in some cases, active efforts to undermine the tribe's capacity to function. Status clarification and the land suit are inseparable issues at Mashpee. The tribe's situation represents a case where tremendous stakes are involved in the outcome of Federal acknowledgement efforts. The tribe feels that the opposition has shown little inclination to negotiate or compromise and that it has in some cases deliberately engaged in tactics that heighten tensions between Wampanoags and their non-Indian neighbors.

The fact that the non-Indian population of the Mashpee township has grown to about 15,000 accounts in large part for the recent changes in the tenor of relationships between Indians and non-Indians. Previously, the Wampanoags had very cordial relations with the few non-Indian people who lived in town year-round and with the sportsmen and vacationers who came to Mashpee only seasonally. Now the rapid population growth has blocked access to important tribal fishing grounds, caused pollution, escalated the value of land, and filled the town with strangers. In less than two decades, the public school enrollment changed from 90 percent Indian to 95 percent non-Indian. The last Wampanoag school principal, Kenneth Coombs, retired in 1977 and presently there is only one Wampanoag employed at the school, namely the tribal chairperson, Joan Tavares, who is salaried through a U.S. Department of Education (USDE) Indian Education Act grant, not through regular school district funds.

When the Wampanoags filed suit to recover their aboriginal land under provisions of the 1790 Non-Intercourse Act, the non-Wampanoag selectmen and the New Seabury Corporation were initially bemused. Eventually, the potential implications of the Maine Indian land claim then in process stimulated a more serious response (the defense ultimately costing the town of Mashpee upwards of a half million dollars in legal costs). Hostility became overt and on several occasions nearly led to violence. The board of selectmen fired the director of the Wampanoag Museum, which the tribe had developed, but which belonged to the town. Next the selectmen refused to accept a grant awarded to the Mashpee Historical Commission to develop an outdoor Wampanoag museum. A clam bake was held one evening during that time on the site of the proposed museum. It was strictly a social event, but organizers included several Wampanoag youths who had been hired to work in the defunct project. Late in the night, after most people were asleep on the ground, the police swept in and arrested nine people, including the son of the tribal chairman (the son is now the ANA director).

There have also been some less confrontational acts of hostility against the Wampanoags. For example, the Indian Education program at the school was suspended during the trial and was not reinstated until 1980. Also, when the town decided to dispose of the old town hall, which had been used by the Wampanoags, the tribal council attempted to buy it. The council's offer was refused and the building was instead demolished. Numerous Wampanoag public employees began to lose their jobs. In 1982, one of the non-Indian selectmen filed a formal complaint against the director of the State Indian Commission (a Mashpee Wampanoag), charging him with maliciously harassing the town of Mashpee by his active involvement in legal appeals which were then in process. The charges were not sustained, but the investigation resulted in a temporary halt of the Commission's budget. The tribe also feels that the town government has obstructed virtually all the tribal council's efforts to obtain permits, zoning variances, and other legal avenues, thereby making the tribe's economic development far more difficult. It was suggested that, among other motives, the town has been reluctant to provide any semblance of support for tribal activities for fear this could be interpreted as recognition for purposes of the petition.

During the trial, as well as since then, the Wampanoags have had some non-Indian supporters although fears of reprisals have prevented many non-Indians from providing active assistance. During the trial, a small group of non-Indians formed a committee to seek a negotiated solution that would be fair to all parties. This group has now been disbanded, but the individuals remain supportive. Additionally, a Quaker organization conducted a formal study which contradicted the validity of opponents' claims that homeowners had experienced losses from the trial process. The tribal council has also had good relations with the staff at Plimouth Plantation, with whom they continue to jointly develop cultural and historical programs. State officials, including the Governor, have also been supportive. Both the executive director and chair of the State Indian Commission (which has been restored) are Mashpee Wampanoags. It should also be noted that the Mashpee Wampanoag Tribal Council entered a float in the Cape Cod and Hyannis bicentennial parades.

One of the benefits of the research done for status clarification has been to firmly establish the authenticity of Wampanoag heritage. New England public television aired a film series, entitled "People of the First Light," which includes a section on the Mashpee Wampanoags. The Massachussetts Humanities Commission funded the publication of Russell Peters' book, The Wampanoags of Mashpee.

The Mashpee Wampanoags have enjoyed considerable support from other Indian tribes and organizations. Mashpees are members of the National Congress of American Indians (NCAI) and have been active in Native American political and cultural affairs in New England. As mentioned, John Peters, Mashpee sachem, is executive director of the State Indian Commission and Hannah Averett, a Mashpee council member, is chairperson.

## 5. CHANGES IN SOCIAL COHESION AND ORGANIZATION

The social system of the Mashpee Wampanoags, like the political system, has been greatly affected by demographic changes of the past 20 years. With the influx of non-Indians, there has also been a growing outmigration of Wampanoags, many seeking jobs in nearby urban areas. In the previous generation, Mashpee had been a small homogenous town where close communal ties were maintained easily. Recent conditions have put a strain on the community life of the Wampanoags. However, the threat posed by development and the reprisals that followed the lawsuit have served to mobilize the Wampanoags and heighten their sense of communal solidarity. There are now more formal tribal activities than previously. Socials are held monthly in the senior citizens center, and there are youth programs emphasizing traditional culture. The Indian Education program at the school draws adult participation from throughout the community, including from individuals who do not have children in the program.

Mashpee Wampanoag membership is about 1,000, a slight majority of whom still reside at Mashpee. Many of the out-migrants are still within the region and return home periodically. During the 1970's, after the council incorporated, a newsletter, *The Mittark*, was begun, partly as a way of maintaining contact with out-of-town members. Nearly all members return for the annual pow wow.

One of the most salient effects of the tribe's status clarification efforts is that the research conducted for the land suit and acknowledgement petition has aided in a cultural revitalization among the Mashpee Wampanoags. This is a very important outcome. Information about family histories and the historical experiences of the Wampanoags, needed as evidence for recognition, has also served to more fully inform people about the underpinning of their tribal identity. Research data have been applied in the development of a variety of publications and other materials that heighten awareness, among Wampanoags as well as non-Indians, about the unique history of the Mashpee community. The Indian Education Act program has been very important in increasing the number of Mashpee Wampanoags completing high school. Materials for that education program reflect research done for status clarification purposes. The State Indian Commission has obtained scholarships at State universities for tribal members; in

1987, 11 Wampanoags were attending college. The tribal council also provides members with fuel assistance and commodity distribution services.

## 6. CHANGES IN ECONOMIC HEALTH

The economy of Mashpee township and the economic conditions of the Wampanoags have undergone recent changes of a large magnitude. Development by non-Indians has greatly increased land values in the town of Mashpee, but the Wampanoags have not benefitted. Much of the land previously owned by Mashpee tribal members has been lost without remuneration due to irregularities in titles and some rather dubious methods of acquisition on the part of the new owners. Increased valuation has meant increased taxes, which places a significant burden on the household income of Wampanoags who want to hold onto their land. At the same time, development has not created construction or related jobs for tribal members, since building is usually done by out of town crews. The loss of political control of the town government has greatly reduced employment of Wampanoags in public sector jobs, too. Additionally, the destruction of shellfish and other natural resources has eroded the economic well being of Wampanoag families, and is a leading factor in the out-migration of tribal members.

Prior to the land suit, the Mashpee tribe acquired land on which was established an aquaculture project cultivating quohaogs, oysters, and clams. The aquaculture project was begun with Comprehensive Employment Training Act (CETA) funding for staff, with technical assistance from Woods Hole Laboratory, and seed stock from the Shinnecock Tribe on Long Island. Oysters have not done well, but the clams and quohaogs provide enough harvest for subsistence purposes. It is anticipated that the aquaculture operation will soon be mature enough to be commercially profitable.

In 1975, the Mashpee Tribal Council also acquired 58 acres from the town for $500. This land is to be returned to the town if the council disbands. This land was one of the original lots of approximately 60 acres formed when the State broke up the Mashpee reservation in 1870. Because of restrictions placed by the town in the deed, the land cannot be sold or used for housing. The Mashpee leaders hope that the 58 acres will provide some interim benefit until other larger land issues are settled. The tract is now undivided and undeveloped. The tribal council attempted to develop a parking lot and beach shuttle, but encountered difficulties in obtaining needed permits. Similar problems occurred when the tribe attempted to develop a light manufacturing plant. Another planned effort, a charter boat service, has also not come to fruition. The tribal council purchased a house which was moved on to the site. Presently, the structure is being renovated to serve as the tribal council headquarters. There are also plans to develop the adjoining woods into an outdoor museum.

In addition to enterprise development, the tribal council has concentrated on school retention, job training, and higher education as ways of improving economic conditions for tribal members. The tribal council currently operates a Job Training Partnership Act (JTPA) program which provides employment services to Indians.

## CONCLUSION

The *Mashpee Wampanoag Tribal Council* represents the people who are the descendants of the original inhabitants of Cape Cod. Until fairly recently, the Town of Mashpee was under the political control of the Mashpee Wampanoag Indians who were also the majority of the inhabitants of the town. The sudden influx of white upper middle class residents, and resultant electoral shift disenfranchised the Wampanoags; development increasingly alienated the land and its native people, ultimately resulting in a court suit which the tribe lost. These unbalanced and conflict-ridden conditions have impeded the Mashpees in their efforts to promote their own economic development or to conduct normal tribal business. To some extent, such extraordinary circumstances confound comparative conclusions that might be drawn about the impact of status clarification activities on a community.

Although ANA's status clarification assistance to Mashpee has been extremely limited, the Mashpee case is important since (a) it is the only tribe that has thus far pursued Federal recognition through the judicial route, albeit unsuccessfully; and (b) in preparing its judicial case the tribe conducted a great amount of research, the results of which are now being used in the development of a FAP petition.

The Mashpee case already clearly demonstrates that of all the status clarification strategies, the judicial route has the potential of being (a) the most devisive to a community, both internal to the tribe as well as between the tribe and the larger community; (b) the most risky; and (c) the most costly, e.g., the Mashpee Wampanoag tribe was opposed by a defense team that ultimately had $1.5 million at its disposal.

## BROTHERTOWN INDIAN NATION TRIBAL COUNCIL

### JUNE EZOLD, CHAIRWOMAN

We appreciate this opportunity to submit written testimony in favor of S. 611, the Federal Acknowledgment Administrative Procedures Act. On behalf of the Brothertown Nation, I am June Ezold, chairwoman of our tribal council. I am pleased to present the following testimony that, we are assured, will be included as a part of the hearing record on S. 611.

Although the Brothertown Nation of Wisconsin does not have a petition pending before the Branch of Acknowledgment and Research, we are currently researching and carrying out the necessary work to support our claim for federal recognition.

The Brothertown Nation has 1,372 members with the majority of our members living within a 90 mile radius of Fond du Lac, Wisconsin. We are governed by a nine member tribal council which meets on a monthly basis at Fond du Lac, our former homelands. Each year our members gather on the eastern shore of Lake Winnebago for our annual picnic and get together. We also convene 3 general membership meetings per year and a Brothertown Homecoming every October.

We descend from various New England tribes, including the Pequots, Narragansetts, Mohegans, Tunxis, Montauks, and Niantics. We emigrated from New York and relocated to Wisconsin territory under the terms of an October 27, 1832 treaty with the United States. Pursuant to the treaty, land was set aside for us east of Lake Winnebago now in Calumet County, Wisconsin.

Under the threat of being removed to a reservation in Kansas, the Brothertown Nation bargained for U.S. citizenship as a means to avoid removal. A Congressional Act of 1839 granted the tribal members citizenship and the right to remain in Wisconsin with the "understanding that those benefits [of citizenship] were in addition to the rights and protection of . . . tribal status." The 1839 Act also alienated the 1832 land by breaking it up into individual allotments for each member. Our allotment history mirrors that of the allotment policy carried out in full force in the late 1800's. As with other Indians subject to allotments, the Brothertown tribe failed to retain all their tribal lands.

A later Congressional act of 1878 recognized a Brothertown Tribe, and the federal government even built a grist mill for the Brothertown and assigned it to a tribal member to be held in trust for the nation. Through the years members of our tribe have benefited from services owed only to recognized tribal members. These have included health care, financial assistance, and educational opportunities. Even with all this, the federal government does not now recognize us.

Our interest in S. 611 is two-fold. First, we view S. 611 as assuring us an opportunity for review by an administrative office. Our history and treatment by the federal government has not been consistent nor clear. For example, a question has emerged that the 1839 Citizenship Act was termination legislation. If so, then pursuant to the present regulations, we are ineligible to pursue federal acknowledgment under Part 83. Accordingly, our only option would be restoration legislation. On the other hand, if both the 1839 and 1878 statute continue a trust relationship, then when and on what basis did the federal government cease treating us as a tribe?

S. 611 would offer us the opportunity to know with a certainty that we are eligible for acknowledgment through the administrative process. Whether this occurs pursuant to S. 611's provision allowing terminated tribes (which we do not believe we are) to go through the process or whether we would seek expedited review under S. 611 because of our previous acts of Congress; these options would be available to us. In either case, with S. 611, the Brothertown Nation would have an administrative remedy rather than our present state of uncertainty. Because of our lack of resources, knowing whether we need restoration legislation or not, remains a very critical consideration.

Our second interest in S. 611 focuses on the extreme importance of continuing and expanding the authority of the Administration for Native Americans (ANA) to fund status clarification grants. We would have been wholly unable to have come as far as we have, had it not been for this resource. We have received three separate ANA grants and are now in our fourth grant. Recently we received funding for status clarification research that will hopefully allow us to finally complete all our necessary work. Other than ANA funding, we have progressed in our work mainly through volunteer help from our members and the community.

The recent study of ANA status clarification grantees conducted by an independent contractor, Orbis Associates, describes the benefits we have received through our grants as:

- "strengthing of the formal structure of the organization vis-a-vis changes in the Tribal Constitution and by-laws,
- growth of membership (in 1982, the Membership Committee estimated 1000 Brothertown descendants with 400 in the Fond du Lac area; the 1985 application specified 1700 members, and the tribal council report which was collected on-site cites 918 members eligible to vote, i.e., members who are 18 years or over);
- on-going activities among the Brothertown Indians to inform themselves of available programs for American Indians which may, presently or once Federally recognized, benefit the tribe and/or members."

We commend ANA for taking the lead role in assisting non-federally recognized groups. The excellent Orbis Report provides profiles of status clarification grantees, as ourselves. I believe that recognized tribes should read these profiles because maybe they would better understand us and other non-recognized Indian groups. We are not "playing Indian" but, in fact, have legal documents supporting our claim for recognition.

We have heard, unfortunately, that some recognized tribes are suspicious that any improvements to the federal acknowledgment process means anybody and everybody will petition to become a tribe and that the floodgates will open.

From what we know of S. 611 this will not occur. In response to such concerns, all I can say to the Committee is that we feel our ambiguous status with the federal government has kept us from fully participating as Indian citizens.

I am attaching a copy of the profile done on the Brothertown Nation of Wisconsin by the Orbis Associates in their report to ANA. We believe it explains our background and describes our progress, as well as our problems, in our efforts to re-establish our federal relationship with the United States.

Mr. Chairman, on behalf of my tribe, we thank you very much for this opportunity. We urge you and the Committee members to move quickly in passing S. 611. It is long overdue.

ORBIS Associates

CASE STUDY OF

# BROTHERTOWN INDIAN TRIBE OF WISCONSIN

EVALUATION OF STATUS CLARIFICATION PROJECTS
FUNDED BY ANA FY 1981 - FY 1988

CONTRACT DELIVERABLE NO. 6

CONTRACT NO. 105-87-6000

Submitted to:

Administration for Native Americans
Office of Human Development Services
Department of Health and Human Services
Washington, D.C.

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# BROTHERTOWN INDIAN TRIBE OF WISCONSIN

## Historical Overview

The Brotherton Nation, Inc. is the corporate body of the Brothertown Indian Tribe of Wisconsin. The corporation is centered in Fond du Lac, Wisconsin, a city of 35,863 situated to the south of Lake Winnebago. Presently, the tribe lists 1,359 enrolled members, a number which includes some out-of-state members. The majority of the tribal membership, however, is located within a 90 miles radius of Fond du Lac.

Tribal members are descendants of various New England tribes, among which are Pequots, Narragansetts, Mohegans, Tunxis, Montauks, and Niantics. Members of these tribes banded together because of their Christian affiliation, and around 1785, emigrated to New York State where they resided with the Oneida for several decades. Historical records collected by the Brothertowns document the tribe's further removal, under the terms of an October 27, 1832 treaty, to land set aside for them on the east shore of Lake Winnebago in Calumet County, Wisconsin.

Later, when pressured to be "removed" to a reservation set aside for them in Kansas, the tribe sought to gain U. S. citizenship. In 1839, the Brothertown Indians gained citizenship and the right to remain in Wisconsin with the "understanding that those benefits [of citizenship] were in addition to the rights and protection of . . . tribal status." This assertion forms a central argument in the Brothertown case for status clarification. At this same time, the 1832 land base was broken up into allotments to individual members. At the time the land was allotted, 40 names were added to the Brothertown rolls by the Bureau of Indian Affairs (BIA) agent. This action would cause later problems for the Brothertowns when awarded an Indian Claims Court land settlement in 1969. This allotment to individual tribal members resulted in the loss of the tribal land base and the gradual dispersal of the membership from the original Brothertown land. The original land is now the boundary for the Brothertown township where only one tribal member currently resides.

Evidence of tribal continuity through the first decade of the twentieth century appears to be substantiated through local records, oral history, and Federal government relations. Conversely, however, the issue of tribal continuity is to some extent clouded by an 1839 Congressional act which could be interpreted as a termination decision. However, the research which was conducted by a Native American Rights Fund (NARF) consultant, indicates that subsequent Federal legislation (specifically in 1878) appears to have recognized a functioning Brothertown tribe. Due to various intervals of Federal interaction with the tribe, tribal rolls involving land allotment in 1838 and land annuity awards in 1901-05 and again in 1967 presently serve as the primary membership criteria.

Documentation of tribal continuity since the 1901-05 rolls until the land judgement award in 1967 is less substantial. The NARF consultant, who also served as petition consultant to the tribe, recommended that there be collected additional documentation of tribal continuity for the first half of this century.

A time period during the 1920s and 1930s has been researched fairly extensively by historians hired by the tribe in 1982. Known as the *Kellogg Era*, this period is important because of the activities of Oren and Laura Kellogg with respect to land and mineral rights claims to the St. Lawrence Seaway. For the purposes of fund-raising and collecting information, the Kelloggs interacted with members of numerous tribes including the Brothertown tribe. Tribal members were encouraged by the Kelloggs and their attorneys to contribute toward an effort to sue the Federal government over land and other claims. This suit was not only unsuccessful but also very draining on the local Brothertown Indians' limited resources especially given the fact that it was during the time of the Depression. As a result, the whole process left a sour taste in the mouths of many tribal members. Moreover, the chicanery of the Kelloggs still makes many Brothertowns angry and has resulted in a certain reticence to get excited about efforts to gain any lawful claims owed the tribe.

The contemporary Brothertown Indians are concentrated primarily in two areas, namely (a) in and around the city of Fond du Lac where about 100 families live and which is near the traditional homestead of Brothertown and (b) in and around Gresham to the north of Lake Winnebago near the Stockbridge-Munsee reservation. Many of the Brothertown Indian families have had long-term relationships with the Stockbridge families through intermarriage and schooling. At least five of approximately 30, mostly elderly, tribal members interviewed by the evaluation team at an evening meeting in Gresham stated that they had attended the former Federally operated Indian school in Red Springs. Several also indicated that Brothertown members used to receive dental services at the Stockbridge tribal headquarters clinic and were accepted into the Indian Health Service (IHS) hospitals. The nearby Indian community of Stockbridge-Munsee has, historically, informally recognized the Brothertown Indians as a separate Indian entity, with informal but recognized leaders.

In 1980 the tribe began active efforts to reorganize and to satisfy Federal recognition regulations. Status clarification efforts, begun by a group of tribal members who primarily resided around Gresham, have resulted in energizing Brothertown descendents throughout the State into a collective yet diffuse community.

## 1. STATUS CLARIFICATION EFFORT AND ANA GRANTS

The Brothertown Indian Tribe of Wisconsin benefitted from ANA grants made to the corporate body of the tribe, the Brotherton Nation, Inc. These grants, the only ANA funds received by the tribe, were:

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|---|---|
| 1982 | The ANA status clarification grant for $19,370 was used primarily to hire two researchers ostensibly to complete a petition. |
| 1984 | ANA SEDS funds were used to establish a Petition Coordination Center staffed by tribal members to conduct, with guidance from professional consultants, various research tasks needed to complete their documented petition. |
| 1985 | An ANA SEDS grant was used to continue the work of the Petition Coordination Center and to complete the documented petition. |

The Brothertown Indians' status clarification effort began approximately two years before receipt of Administration for Native Americans (ANA) grant funds. The tribe's first organized effort involved individual and tribal contributions as well as a four-month Comprehensive Employment Training Act (CETA) grant in 1981, obtained through the La Raza Unida office, for the purpose of conducting historical research. Prior to this, many individual Brothertown Indians had conducted their own research into the history of the tribe. Much of this research focused around family groupings.

Indeed, the original genealogical documentation was done in the late 1970's by Rudy Ottery, a non-Brothertown, who at the urging of her Brothertown husband, began collecting genealogical information on her family. Because the tribe was aware of her efforts she was recruited to serve as tribal genealogist, although she lived in Vermont. This circumstance later contributed to problems (discussed later) associated with the tribe accessing the data as needed.

Also through individual and tribal contributions, initial contacts were made with the first professional researchers. A report by Phyllis Frederick, coordinator of the grants writing effort, in the June 1982 newsletter states that ". . . in 1979, Edd Welsh . . . hired an historian named John Turcheneski to begin researching Brothertown history . . . [and] resulted in a body of research that has taken hundreds of hours and costs hundreds of dollars" (presumably in-kind dollars). In an earlier newsletter (June 1982) another letter from Frederick is noted which mentions that while on vacation in Arizona, she met with Welsh and Turcheneski (University of Arizona), ". . . to go over material specifically prepared to assist us in writing [the petition]." The meeting was taped, but materials were not made available to the tribe at that time.

(1) **The FY 1982 ANA status clarification grant** for $19,370 was primarily used to hire Turcheneski as the research historian and another researcher Robert P. Gough, an anthropologist to complete a petition draft. Gough was either a principal in or employed by COACT Research, Inc. (source of acronym unknown). Specifically, the objectives of that grant were:

- o *accomplish specific documentation necessary to fulfill research requirements for 25 CFR 54.7(a),(b) and (c).*
- o *training of the Brothertown History Committee (BHC) in the specifics of historical research and anthropological research so that the petition may be completed and so that the history of the Brothertown Indians will be preserved.*
- o *establishment of a Brothertown Indian Archives for the continued study of Brothertown history with people trained to continue it.*
- o *completion of the Ethnohistorical Report that will accompany the petition and can be used as documentation for 54.7(a), (b), and (c).*
- o *review and evaluation of and recommendations and guidance concerning the research and petition draft by experts prior to writing of the final petition.*

- *actual writing of a petition draft by the end of the 17 month ANA grant.*

Staff from the ANA-funded "Status Clarification Resource Mobilization Project" conducted by the Native American Research Institute (NARI) had apparently assisted in writing the grant application. The majority of the funds ($10,000) were earmarked for contractual services to be provided by the two consultants; additionally, $1,200 went for travel and $8,170 was described as other (copying, printing, equipment).

There were immediate problems regarding implementation of the project. Although grant documents indicated that the project was to start September 1, 1982, the first ANA check was received October 22, 1982 (according to a June Ezold letter to Mae Bennett, July 5, 1983); thus, work did not commence until November and the project period had to be extended by two months through March 31, 1984.

The Final Evaluation Report for that grant also noted "several limitations" to accomplishing the objectives; these limitations were:

- *the proposed meetings with the tribal "Council of Elders" to tape oral histories was not funded (this was primarily travel costs since elders are spread over the state) and consequently, the research severely hampered and limited the description of the contemporary community; furthermore, the consultants anticipated certain materials to be with the Wisconsin State Historical Society which turned out not to be available; this situation then necessitated travel to Chicago, Washington D.C., Minnesota, Indiana, New York, New Jersey and Vermont;*
- *the training of the BHC* [Brothertown History Committee], *although accomplished, was limited due to limited travel funds;*
- *the establishment of the archives was underway, but not yet completed (although the objective was stated as accomplished);*
- *the anthropological report, contracted to COACT was late in coming and limited in scope; COACT was to have "assumed the*

*primary responsibility for reviewing materials researched by the[BHC] and organizing an ethnohistorical and anthropological overview of the history of the Brothertown Indian Community in Wisconsin from 1832 to the present;"*

- *the research review (by the NARF consultant) indicated a need for more work on the twentieth century period, more documentation of "community", and review of the legal implications of the 1878 and other Congressional Acts;*

- *instead of a draft petition being completed, only an outline draft was completed, with an "historical sketch" developed by Olivia Tounsey (the Chair of the BHC).*

Furthermore, there were problems encountered in accessing materials from the tribal genealogist, who resided in Vermont. The anthropologist blamed the limited scope and delay on his work to the lack of data forthcoming from the genealogist. These problems with the genealogist persisted into the time of the ORBIS study team's site visit; by then the genealogist had resigned, but had not turned over materials.

Also the Brothertown Indians missed the deadline for their continuation application; thus, they lacked funding from April through October 1984. A letter to ANA (from Phyllis Frederick to Mae Bennett, January 31, 1984) noted ". . .[we] were not properly informed by ANA grants management as to specific requirements relating to our ANA project and consequently we were unable to apply for the second year of the Status Clarification grant."

**(2) The FY 1984 ANA SEDS grant** was different in that the majority of funds were directed at (1) training and employing Brothertown tribal members to perform much of the work necessary for the documented petition, (2) coordinating the various segments of the research work, and (3) hiring professional consultants only as needed. Specifically, the objectives of the FY 1984 project were to:

- *provide a Petition Coordination Center (PCC) to facilitate the process of research collection and petition draft writing;*

- o *contract tribal members as paraprofessionals, contract consultants to perform specific research, writing, and the organizing of an acknowledgement petition, and provide members with advanced training in research and petition preparation;*
- o *establish a permanent tribal archives by allocating funds to copy all collected materials and transport them to a central location in order to secure the history and heritage of the Brothertown Indian People, and facilitate petition preparation;*
- o *complete research imperative to completion of a petition;*
- o *continue a review team which will review collected material, make recommendations for further research needed, provide guidance in improving document storage and maintenance, and petition preparation.*

Substantial progress was made in implementing the objectives: (1) offices to house a Petition Coordination Center were secured and the PCC was operational by November 1984; (2) staff were hired by November 5, 1984 and trained over a three-day period by the Grant Administration and the Head Librarian of Marian College; the Petition Paraprofessional attended further training in April; and a petition status report was completed in February 1985 by the NARF consultant after reviewing materials collected up to that date; (3) all historical and genealogical information was copied with originals going to the archives at Marian College and copies maintained at the working archives at the PCC; research tasks and plans, developed under the assistance of the NARF consultant and the review team, were implemented; and (5) the materials review team met in June 1985 to review a petition draft including an historical narrative - - 1600 to 1840 - - and an enrollment/genealogical narrative.

**(3) The FY 1985 SEDS grant objectives were to:**

- *continue operation of the PCC and the tribal archives to facilitate finalization of a Brothertown Indian Federal acknowledgement petition;*
- *contract tribal members as paraprofessionals to perform specific research, writing and finalization tasks for an acknowledgement petition;*
- *complete research imperative to the completion of an acknowledgement petition and support community organization and development activities.*

The continuation of FAP petition activities seems to have developed in an orderly manner. Newsletters indicate that the organization was able to mobilize many community members in volunteering their time toward participation in various task-oriented groups such as the History Committee, Constitution/By-laws Committee, and Grantswriting Committee. The "grant administrators report" in the April 1985 newsletter reports 726 volunteer hours in a seven-month period and in-kind contributions of $6,757. A December 1986 newsletter notes tribal member donations as $1,400 in response to a notice for solicitations after ANA funding expired at the end of August 1986. The December minutes of the tribal council noted that the genealogical work had been completed. With the conclusion of ANA funding, there was a slow down in the organization's cohesion and activities. Although an unfunded ANA application, submitted in June 1986, noted that the Brothertown Indians ". . . have been able to complete and submit a petition . . . to the Federal Acknowledgement Board," the tribe has decided to wait on submitting a petition pending further research on the 1878 and other Acts. Although they have completed their documented petition, the Brothertown tribe is now, through ANA assistance to NARF, exploring the possibility of legislation for restoration of their tribal status, rather than pursuing the FAP route. There is some question that the tribe may have, in fact, been terminated through legislation in the late 1800's. If this is the case, the tribe would be ineligible for the FAP process. This does not mean that the research effort was in vain. The petition materials can be used to make a case for legislative restoration.

## 2. RESULTANT FINANCIAL BENEFITS

The Brothertown tribe has not been very successful in securing funding for tribal operations and activities. As **Table 1** on the following page reflects, ANA funding represents the only large grant awarded to the tribe. Since the onset of their status clarification activities, the tribe has relied on voluntary assistance from the community.

The Brothertown tribe began concerted actions to address status clarification in 1980. At that time, voluntary contributions and small fund-raising activities provided the group with funds for operation. Also, through an arrangement with an organization receiving Comprehensive Employment Training Act (CETA) monies, tribal members used CETA traineeships to begin research of the tribal history. Not incorporated until 1982, the tribe was not able to act as a grantee for funding requests and consequently did not apply for its own funding prior to that time.

## Table 1

### Funding History

| Year | Funding Source | Type of Source | Amount | Objective |
|---|---|---|---|---|
| 1982 | ANA | Federal | $19,300 | Status Clarification |
| 1982 | Wisconsin Humanities Committee | State | 999 | Traveling Photo/ Historical Exhibit |
| 1982 | National Indian Lutheran Board | Private | 500 | Catalog research |
| 1982 | Newberry Library Center | Private | 100 | Status Clarification Workshop |
| 1984 | ANA | Federal | 74,809 | Status Clarification Research and Training |
| 1985 | ANA | Federal | 54,345 | Status Clarification Petition Completion |
| 1986 | Stackner Foundation | Private | 1,000 | Computer Purchase |

In 1982, the tribe began funding quests for status clarification purposes. ANA awarded the tribe $19,300 for the initial research investigation. The funds were primarily used to employ two professionals, an anthropologist and an historian, as consultants. The tribe also began to access other funding sources, and successful funding efforts produced three small grants for tribal activities. The National Indian Lutheran Board awarded the tribe $500 to assist in cataloging the research data that was being collected. An additional grant of $100 from the Newberry Library Center enabled two tribal members to attend a status clarification workshop in Chicago, Illinois. Also in 1982, the Wisconsin Humanities Committee awarded the tribe $999 to construct and display a traveling exhibit on the Brothertown tribe.

The Brothertown tribe again sought ANA funding in 1984 and subsequently received a social and economic development grant. The $74,809 grant was used to open a Petition Control Center in Fond du Lac, to coordinate various research activities, and to provide training and employment for tribal members involved in research for the Federal acknowledgement petition.

In 1985, the Brothertown tribe was funded for a third ANA grant in the amount of $54,345. This grant continued the activities begun with the 1984 grant and included an objective for completing the acknowledgement petition. A petition was subsequently prepared. However, it was determined by the tribe's Petition Committee and the petition consultants that part of the document needed strengthening and that other routes for Federal recognition should also be considered. The petition was not, therefore, submitted to the Bureau of Indian Affairs (BIA).

In 1986, the tribe submitted a grant proposal to ANA for an Automation and Training Project which would allow for a *computerized cataloging of archival materials*. The proposal, which requested $62,175 was not awarded. Since the expiration of the ANA grant in August 1986, no other Federal funds have been received by the tribe.

Tribal attempts to access sources other than Federal funds have been active and varied. Grant requests have been submitted to a number of State and local funding sources as well as national sources, which have included foundations, agencies, and corporations. Funding assistance has been requested for a variety of objectives. In addition to research activities for the acknowledgement petition, requests have included support for the tribal newsletter, equipment support, and training components.

Unfortunately, grant requests have not been successful. Other than a $1,000 grant for a computer from the Stackner Foundation in Milwaukee, Wisconsin, no other grants have been awarded since 1986.

Other funding benefits since the onset of status clarification activities have come from within the tribe. In-kind contributions, in terms of volunteer time and donations from tribal members, while difficult to assess appear substantial. In 1984, tribal records indicated that in-kind contributions from 1981 to 1984 amounted to $115,000. A year later, in March 1985, the tribe reported in-kind contributions for one month as 726 volunteer hours and $6,757. in dollar contributions.

Such in-kind contributions have not been sustained since the Petition Control Center closed in 1986. For example, the quarterly newsletter in January 1988, reported a balance of only $176 in the Brothertown tribal account and requested donations from tribal members. Since 1986, newsletter subscriptions and donations have constituted the sole funding sources for the tribe.

The Brothertown tribe's current problems in obtaining funding for tribal operations and activities appear to stem from the following causes:

- o Activity and interest have waned since the Petition Control Center was closed. The Center represented a first-time office facility and a means of recognition for the tribal government.

- o The tribe has reached a stasis period until NARF can continue its research and/or legal proceedings. When research activities and support were an ongoing preoccupation for the tribe, tribal members contributed a great deal. Now that much of the research activity rests with an outside organization, tribal members do not perceive an immediate need for tribal support.

- o Tribal focus for grant requests has been primarily confined to objectives and activities connected with the preparation of an acknowledgement petition. A wider focus and concern with other tribal needs might result in additional funding benefits.

- The tribal member acting as grantsman is now involved in a more demanding full-time job which limits grant preparation time.

- The tribe has not fully accessed State or Federal funds that might be available. While the tribe has demonstrated resourcefulness in locating potential private funding sources, Federal and State government sources could be explored further. Again, the tribe also might need to look at different services that it could provide its members.

## 3. CHANGES IN GOVERNANCE STRUCTURE

In the late 1970's, the chairman of the Stockbridge-Munsee Tribe approached the leadership of the Brothertown tribe to inform them about the existence and potential benefits of the Federal Acknowledgement Project (FAP). At about the same time, an "ad hoc group" of Brothertown Indians was formed in Gresham upon the urging of two attorneys from the La Raza Unida legal services program in Jefferson, Wisconsin. The attorneys had become aware of the FAP process, and approached Anna Jacobs and Marie Robinson, two sisters who were recognized as community elders/leaders among the Brothertown Indians. The attorneys volunteered to assist in the effort by sponsoring researchers on the status clarification effort through slots on their CETA grant. An office was opened on the Stockbridge-Munsee reservation where the initial work was focused.

It was at this point that the tribal council of the Brothertown group was reorganized. This reorganization came about specifically for the purpose of addressing status clarification and the research needed for completing a FAP petition. In early 1980, the ad hoc group mentioned above chose Anna Jacobs as the first chairperson and Marie Robinson as the vice-chair and created a five member tribal council. Among other status clarification tasks, the Council undertook writing a tribal constitution and tribal by-laws. On April 15, 1980, the group filed a letter petition to FAP as the Brothertown Indian Tribe of Wisconsin. Shortly thereafter, there were some changes in the tribal council membership when two members (Anna Jacobs and Earl Robinson), both from the Gresham area, resigned. In April 1982, two more members from the Gresham area resigned from the Council. By the time the study team conducted its site visit in 1988, members of the tribal council resided and worked in various parts of the

State: two from Madison (70 miles southwest of Fond du Lac), one from Woodruff (approximately 185 miles northwest of Fond du Lac) and the others from nearer the Fond du Lac/Gresham area. Thus, the political structure is now comprised of council members who are representative of the broad Brothertown membership located throughout, even outside, Wisconsin.

Tribal council minutes indicate that the constitution was in the process of being amended in October 1981. The minutes also noted a motion made to "fill-out" the incorporation papers. In June 1982, the tribe was incorporated as the Brotherton Nation, Inc. and the tribal headquarters were moved to Fond du Lac.

Initially, the tribal council was organized into three committees congruent with the research areas needed for FAP. These committees were the (a) History Committee "consisting of members in Arizona, Illinois, Minnesota, New York and Wisconsin" [Brothertown Newsletter, November 1981]; (b) Membership Committee, and (c) Constitution/By-laws committee. Committees consisted of various Brothertown members and their spouses.

The issue of the role and/or rights of non-Brothertown spouses seems to have been a major concern in the evolution of the governance structure of the tribe. The March 1985 Constitution and By-laws refer to associate membership being allowed for spouses which allowed them to vote and to serve on committees, but not to hold office. The January 1986 amendments only reference that "all spouses, widows or widowers of Brothertown members" can be associate members with "the right to serve on a committee but shall not hold any office." Further amendments in November 1987 delineate that only enrolled members can vote, and associate members "shall have the right to serve on committees" but not to vote or hold office.

Although the council first started as a five-member group in 1981, it was changed to a nine-member group early in 1982, with four officers and five council members. This is still the case. At the time of our visit the tribal chairperson was Ms. June Ezold, who has held the office since May 1982. Ms. Ezold was recently elected to her third consecutive term.

The terms of office have always been three years for the four offices of chairperson, vice-chairperson, secretary and treasurer. Terms for the five council members have been two years. The Constitution and By-laws, until January 1986, limited officers to serving only two consecutive terms and council members to three consecutive terms.

The election procedures for the tribe have recently been tightened. Until 1986 no reference was made to election committees, only to procedures that were to be followed by a Nominating Committee. There were also specifications that absentee voters must put their names on their return envelopes. Amendments finalized in January 1986 specifically established an Elections Committee. Also, the provisions for absentee voting were expanded by setting deadlines for mail-out and receipt of ballots, provision of a coded postage paid return envelope/ballot and removing requirements for any other identifying marks.

While still in need of growth, the amount and types of changes in the organizational structure of the tribe as a result of status clarification can clearly be evidenced. The improvements in the organization of the tribe can be characterized as:

(1) formalization of a corporate identity (the Brotherton Nation, Inc.) for the tribe;

(2) establishment of a formal Constitution and By-laws for the tribe;

(3) serious discussion/review of the Constitution and By-laws resulting in amendments; and

(4) formalization of election procedures.

Furthermore, the monthly general tribal meetings serve not only a governmental function, but also as a forum for the dissemination of news concerning social and educational programs. From 1984 to 1986, when there was the Petition Coordination Center funded primarily through ANA, it served as tribal offices, a common meeting place, and a general social focus for the tribe. Even without a permanent physical location for the tribal offices, the cohesiveness of the tribal members today as a group with a common focus was evident at the general tribal meeting attended by the ORBIS study team. At this meeting there was discussion about several items of interest to community members:

- a program announcement from ANA
- a job vacancy announcement from the Minneapolis Area Office of the BIA
- an announcement of a Wisconsin Minority Student Leadership Conference
- the Healthy Living monthly newsletter.

These items were made available to individual members who expressed an interest in either obtaining a copy or getting the referral names/numbers for further information.

The Brothertown Indians' growth in familiarity with general concepts of Indian tribal existence relative to Federal recognition is also evidenced in the evolution of their documented membership/eligibility criteria. Until the January 1986 Constitution, eligibility was defined in terms of "any person who can prove that they are a descendant of the Brothertown Indian". In 1986, this was changed to those "who can prove that they are a descendant of the Brothertown Indian from one of the following rolls: 1839 and addendums, 1901-1905, and any other substantiating evidence as needed to establish their descendancy from a Brothertown Indian ancestor being claimed". The latest proposed amendments further qualify that any such proof "must be confirmed by a three-quarters affirmative vote of the full Tribal Council."

In summary, it can be said that the status clarification efforts during the ANA funding period, roughly September 1982 through August 1986, resulted in the:

- strengthening of the formal structure of the organization vis-a-vis changes in the Tribal Constitution and by-laws,
- growth of membership (in 1982, the Membership Committee estimated 1000 Brothertown descendants with 400 in the Fond du Lac area; the 1985 application specified 1700 members, and the tribal council report which was collected on-site cites 918 members eligible to vote, i.e., members who are 18 years or over);

- on-going activities among the Brothertown Indians to inform themselves of available programs for American Indians which may, presently or once Federally recognized, benefit the tribe and/or members.

Regarding some areas where there still needs to be effort made to strengthen the tribal organization, we can make the following observations:

- the tribe has not operated any other programs other than those related to status clarification funded by ANA;

- organizationally, the tribe needs to develop an administrative capacity beyond simple governance functions to fully meet the social and economic development needs of its membership; and

- mechanisms for administrative accountability (personnel policies, comprehensive planning activities, management and organization planning structures) need to be conceptualized, considered and implemented if organizational growth is to occur - - we note that while Personnel Policies had been developed for implementing the FY 1985 ANA grant, a copy could not be located.

The growth of the tribal organization beyond just status clarification activities is imperative in that if and when Federal recognition is gained, the responsibility of operating available programs must be built upon a solid operational base of both experience and planning. Furthermore, should Federal recognition elude the Brothertowns, there are still other programs available to non-Federally recognized tribes and community-based organizations which the Brotherton Nation, Inc. (as a non-profit organization) could tap to further social and economic growth for its members.

## 4. RELATIONSHIPS WITH THE STATE AND SURROUNDING COMMUNITIES

Any changes in the Brothertown tribe's relationship to the non-Indian community is attributable to the tribe's having a governmental body. Formal tribal government has increased the non-Indian community's awareness of the tribe and has contributed to its recognition of Brothertown tribal members as Indians. Prior to the organization of a tribal government, there appears to have been little or no recognition or knowledge of the Brothertown tribe by non-Indian groups. Since the formation of the governing structure, the non-Indian community's response has been positive whenever interaction with the tribe or tribal members has occurred.

Perhaps a more significant change occurred in the relationship of the tribe with State and national tribes and Indian organizations. The Brothertown tribe is now a visible organization. Not only does visibility acquaint other tribes with the Brothertown tribe, but it also introduces the Brothertown tribe to certain services and benefits associated with Federal recognition efforts.

Brothertown tribal members identified different areas of support and assistance which demonstrate the change in relationships both with non-Indian and Indian communities. These areas include technical assistance, training, special recognition of the tribe, and material support.

### Technical Assistance

The Brothertown tribe seems to be able to identify and secure technical assistance from various sources as the need arises. Marian College, a small private college in Fond du Lac, has provided the tribe a great deal of technical assistance with the handling and preservation of tribal archival materials and records. Marian College also agreed to reserve a portion of the school's library as a repository for tribal records. In its capacity as caretaker for the tribal archives, the college's insurance covers the Brothertown materials in the repository; however, the tribe also pays for insurance of the archives under a separate policy.

Mostly, instances where the tribe has received technical assistance from the non-Indian community have been associated with tribal incorporation and the preservation of archival materials. For instance, Judicare, a Wisconsin legal assistance agency, helped the tribe in the revision of the tribal constitution and by-laws. While in the process of archival planning, the tribe received assistance from the Milwaukee Museum and the Wisconsin Historical Society. The Wisconsin Historical Society also provided technical assistance to the tribe in the preparation of the Brothertown traveling exhibit.

Technical assistance with tribal governance and archival materials was also provided by the Stockbridge-Munsee tribe. The chairperson of the Stockbridge- Munsee assisted the Brothertown tribe at the onset of tribal reorganization and status clarification. Brothertown tribal members also had contacts with the Stockbridge-Munsee Library Museum concerning the collection and preservation of archival material.

### Training

Aside from intensive and on-going training in archival records from Marian College, most of the training opportunities in which tribal members have taken part have been offered by Indian organizations. One of the benefits associated with Brothertown visibility is the invitation to participate in training seminars and workshops.

Areas in which tribal members have received training were related to tribal archives, status clarification, and grantsmanship. Organizations sponsoring training have included the National Indian Lutheran Board, the United Indian Development Association, the Native American Research Institute, the Native American Center at Nicolet College in Wisconsin, the Native American Center at the University of Wisconsin-Stevens Point, and the Smithsonian.

Usually two or three tribal members attended the training sessions. Since different tribal members attended the workshops or training courses, training opportunities were extended to a number of tribal members. Their attendance also increased the visibility of the Brothertown tribe and allowed for an exchange of information with other tribes.

### Special Recognition

Both Indian and non-Indian groups have accorded the Brothertown Indians various forms of recognition. Again, this change in relationships has come about since the Brothertown tribal reorganization in 1982 and subsequent tribal activity to attain Federal recognition.

In 1982, the Governor of Wisconsin proclaimed the period from October 1982 to October 1983, as the *Year of the Brothertown Indian*. The Brothertown tribe sought the proclamation in order to celebrate the tribe's 150th year in Wisconsin. In conjunction with the proclamation, the traveling exhibit funded by the Wisconsin Humanities Committee was completed, featuring the history of the tribe. The exhibit was put on display at several sites throughout the State, including libraries, banks, schools, and churches.

Also in 1982, the Brothertown Indians' history was incorporated into the Wisconsin Woodland Indian project, an effort to develop a fourth grade social studies curriculum for use by Wisconsin public schools. The Brothertown tribe has also received media recognition through being featured on a public television network program, *Wisconsin Magazine*. The program segment was an eight-minute feature of the tribe and its status clarification efforts.

Other forms of recognition from the non-Indian community indicate that the Brothertown tribe is regarded as a distinct organizational, as well as tribal, entity. Tribal members agree that local newspapers cover tribal events or activities whenever the tribe requests publicity. There is also evidence that the tribe is included in organizational membership or appointment on special committees.

The Brothertowns have a somewhat ambiguous relationship with the area office of the Bureau of Indian Affairs. Tribal members recounted instances where Brothertown students received higher education grants normally awarded only to members of Federally recognized tribes. However, the educational support appears to have been granted only after students from Federally recognized tribes were served. When a petition consultant asked about Federal services provided to Brothertown students, BIA Area Office personnel expressed the opinion that the scholarship services were mistakenly awarded.

Other inconsistencies connected with Brothertown tribal status were noted. In March of 1988, tribal members from the Gresham community related to the study team that health services had always been provided by the Stockbridge-Munsee health clinic. They also seemed confident about receiving services from the Oneida clinics. (However, this practice has apparently ceased; subsequent to the ORBIS team's visit, the Brothertown's Tribal Council Minutes for April 16, 1988 noted that, "As of September 16, 1988, you must be an enrolled member of a Federally recognized tribe to get free medical help on Reservations.") Brothertown students in public schools are included in the Indian education service population for Indian Education Act programs. The tribe is also invited to attend meetings and workshops which include the other Wisconsin tribes.

At the present, there are no State recognized tribes in Wisconsin. Consequently, the situation of Brothertown tribal members receiving Federal services may have occurred due to the absence of mechanisms like State recognition or previous need for Wisconsin Indian agencies to consider service delivery to anyone other than Federally-recognized tribes.

Recognition from the eleven Federally recognized tribes in Wisconsin appears to be rather limited. The tribe receives support from nearby tribes like the Stockbridge-Munsee and the Oneida, who submitted resolutions of support for the Brothertown petition. Other tribes, however, are more hesitant in their relationship with the Brothertown Indians. According to one tribal member, there is a "respectful, wait and see attitude" from most of the Wisconsin Indians. This attitude on the part of other Indians in the State, tribal members believe, is likely to continue until the tribe's Federal status is determined.

### Material Support

The organizational status of the tribe has also resulted in many non-Indian contributions to the tribe. Tribal members from the Gresham community cited non-Indian support in the form of goods donations for tribal fund-raising activities and lowered rent for meeting places. Tribal council members also indicated that donations of materials were made when the traveling exhibit was being constructed. Interest in the Brothertown Indians' archival collection has also promoted the donation of historical materials to the tribe by non-Indian individuals and organizations.

## 5. CHANGES IN SOCIAL COHESION AND ORGANIZATION

The change in land tenure from a communal landholding to individual ownership in the 1800's is related to the displacement of Brothertown tribal members from the original land base. Present tribal members, except for a concentration near Gresham, are now dispersed throughout Wisconsin and in other States. Despite the dispersed settlement, an effective intra-tribal communications system is apparently in place.

Communication among tribal members was deemed necessary due to need evidenced by the annuity rolls of 1901-05 and 1969, due to tribal interests spurred by the Kelloggs in the 1920's, and due to social activities like the Brothertown Homecoming, an annual event until World War II, and which has since 1980 been reconvened.

After tribal reorganization began in 1980, communication about community issues and activities was more formalized as the tribal government assumed much of the responsibility for information exchange. Communication and community interest also increased as the tribe began to work on status clarification activities. The communication structure, intra-tribal support, and tribal activities reflect the changes in social cohesiveness and communication that are now occurring within the community.

## Communications

Prior to status clarification goals, the Brothertown tribal members appeared to rely on an informal exchange among family members for tribal communication. One of the projects begun immediately by the tribal government was a compilation and address up-date of tribal members based on the annuity rolls of 1969. The initial contacts with tribal members served a dual purpose: that of informing them of Federal recognition procedures and that of enrolling members.

A Brothertown Newsletter was started in 1981 and became a bi-monthly publication. The newsletter began an on-going exchange of information about status clarification, tribal enrollment, tribal activities, news of individual tribal members, and historical items about the tribe. Financing for the newsletter was assumed by the tribe as individual tribal members secured copying services from organizations or places of employment and the mailing costs were covered by donations from tribal members. Subscriptions, which numbered as high as 170, also contributed to the publication and mailing costs.

The ANA 1984 grant award further increased the communication network for tribal members. Once the Petition Control Center was in place, tribal members noted that a growth in the community occurred. The Center represented the first central office for the tribe and fulfilled a number of functions. In addition to becoming a centralized location for tribal records, the Center fulfilled social and organizational purposes. Council and committee meetings were conducted at the Center, and more members became involved with tribal activities as a centralized office served to increase tribal information. Tribal members outside the Fond du Lac area were also attracted to the Center where they had access to historical documents, could view the displays exhibited at the Center, and could contribute additional information or materials for the status clarification effort.

When the tribal government was unable to find funding that would continue operation of the Center, community involvement diminished. According to the tribal chairman, a quorum of the tribal council - - necessary to conduct tribal business - - has always been met; however, a quorum for the general meeting has not always been met in the past year. The quarterly newsletter, which includes the minutes of the tribal council meetings, remains an effective source of information for tribal members. The tribal government continues to publish and mail the newsletter although lack of finances has limited its publication to a quarterly basis.

## Intra-tribal Support

Support from tribal members has been a pivotal factor in the Brothertown's maintenance of group cohesion and tribal organization. Before the tribe's status clarification initiative began, a loose-knit association existed among tribal members. Since status clarification efforts have been undertaken, however, the growth in the community can be seen in the support given the tribal organization through donations and volunteerism.

The tribal organization has relied on cash donations from tribal members from the onset of organizational activities. Not only were donations needed for mailing expenditures, but the tribe also needed contributions for the rental of meeting places. While it was in operation, the Petition Control Center served as a meeting space. Now that the Center is closed, the tribal organization again has to request cash donations to meet rental costs.

Volunteerism has taken several forms. When members of the Gresham community first began collecting documents about the tribe, volunteer time required personal expenditures such as for travel and copying. Volunteers undertook research tasks without remuneration until the ANA grant award in 1984. Even with the operating funds available from the grant, a cadre of volunteers continued with certain phases of the research and provided the tribal organization much of the in-kind contributions required for the grant. Volunteers have also contributed to such projects as preparing genealogical records, attending workshops or seminars, and submitting material for the newsletter.

Also contributing to the tribal organization is the support from non-Brothertown spouses and family members. Cash donations, work on petition committees, and fund-raising activities are among such contributions. Not all tribal members, however, have reacted favorably to the contributions from non-Brothertown community members. Opposition to the amount of participation by non-Brothertowns, vis-a-vis discussion of tribal concerns and in decision-making, is one of the issues with which the tribal government has had to deal.

### Tribal Activities

In the quarterly newsletter prepared in January 1988, a calendar of monthly meetings of the tribal council was listed. At the monthly meetings, time was also scheduled for general tribal meetings and for social gatherings. The schedule of events also included the Brothertown Homecoming and annual picnic. All of the tribal meetings were scheduled to be held in Fond du Lac except for the August meeting which is held annually in Gresham.

The Brothertown Homecoming, which was discontinued during World War II, was reinstated as a tribal activity in 1980. Thereafter, notices and arrangements for Homecoming were handled by the tribal government. While the Homecoming was customarily a two to three day affair, now a picnic is scheduled as a separate activity and both affairs are for one day. According to the tribal chairman, the attendance at the 1987 picnic was about 150 to 200 Brothertown people.

Other tribal activities such as fund-raising events or Christmas parties may occur as tribal interest or need dictate. However, the Brothertown Homecoming is the primary event that draws tribal members together and, like the newsletter, maintains a means for exchanging tribally-related information.

## 6. CHANGES IN ECONOMIC HEALTH

Since the data that are compiled by the tribe are related specifically to the tribe's acknowledgement effort and are primarily genealogical and/or historical in nature, this issue is difficult to address. The tribe does not collect or keep information on socio-economic demographics or other "needs" data of its membership; nor does it have any sort of overall economic development plan (OEDP). Since the tribe is fairly dispersed throughout a large area - - that is to say it would be difficult to point to a single Brothertown community - - the need for such data has not been seen as a priority by the tribe. Therefore, whatever impressions can be offered are subjective and based only upon ORBIS' brief visit with primarily tribal council members, former staff of the ANA-funded Petition Coordination Center, and an evening meeting with "community folk" in Gresham. The Brothertown Indians seem to be fairly well assimilated into the workforce, representing retired truck drivers as well as small businessmen. Any hardship factors noted were not any different from what might occur in any rural, farm community or industrial area hit by hard but hopefully transitional times. The leadership did not stress any undue hardships or unmet needs among members, other than the changes in health care availability apparently caused by the closing of certain BIA/IHS clinics in the area.

A primary consideration for the tribe should be the development of a comprehensive database outlining community needs in terms of education, social welfare, health and employment variables. Such a database could be very useful to the tribe in terms of gaining other funding, particularly for SEDS; moreover, such data would undoubtably come in handy when and if Federal recognition is gained. A comprehensive planning effort based on solid data should definitely become a priority for the tribe.

## CONCLUSION

Having experienced some problems initially implementing their status clarification efforts, the Brothertown tribe had (by their second ANA grant) gained a cohesiveness and communal expertise in research which should serve as a model to other tribes pursuing status clarification. The tremendous community response in terms of (1) collecting both oral histories and genealogical information, and (2) organizing and housing their archives should be lauded.

In respect to Federal recognition, the Brothertown Indians of Wisconsin represent an unusual, but not unique, case in that they represent a widely diffuse tribal group spread over the State rather than a tribal "community" in the usual sense. As such, they face certain challenges if they are to pursue social and economic development. Presently, their status clarification efforts have been the driving force in continuance of their tribal organization. As mentioned under items 3 and 6 above, their response to the need for organizational growth, beyond purely governance functions, will largely determine how successful they will be in meeting community and/or individual member needs.

Any effort to conduct social and economic development will require the Brothertown Indians to view their membership in terms more congruent with planning concepts of *community*. Potential SEDS development could focus on (1) the seemingly more cohesive rural and less diffuse core group in Gresham, while addressing in other ways the individual needs of the more "spread-out," and apparently more economically self-sufficient members; or (2) the population centered in and around Fond du Lac which could benefit from the types of SEDS strategies employed by urban Indian centers. In either case, the tribe can begin by conceptualization of tribal goals based upon a concrete demographic database of its members. ANA SEDS assistance could potentially assist the tribe define its community and set directions for growth. ANA, as part of its monitoring of grants, could have provided technical assistance to the Brothertowns to enable them to "cast a broader net" in setting tribal goals.

221 West C Street
Pomona, Kans. 66076
May 4, 1989

Daniel K. Inouye, Chairman,
Select Committee on Indian Affairs,
Washington, D. C. 20510-6450

Dear Sir:
Our group, the Delaware-Muncie Indians of Franklin County, Kansas, wishes to be Federally recognized.

We have many records of our people, most of which were obtained in the early 1970's when we instituted a lawsuit against the Federal Government and the main body of the Delawares in Oklahoma to be included in their judgement funds.

We held up the disbursement of the funds for some months, but were never included in the settlement.

We are a small group of the Muncie branch of the Delaware Indians. We are also known as the Christian Indians, as our ancestors were Christianized by Moravian Missionaries who started working with and teaching our people about the year 1740.

The Moravians founded Bethlehem, Pa. in 1741. The archives there contain many records of our ancestors. The Delaware tribe occupied what is now eastern Pennsylvania, New Jersey and part of Delaware. Because of the white men advancing civilization, they were led by their missionaries to Ohio and Michigan and finally to the Thames River in Canada in 1792. There, they built the once flourishing community of Fairfield.

My Great-Grandfather, Ignatius Caleb, was born in Fairfield in 1836. In 1837 a group of the Delaware-Muncie Indians left Fairfield to join the main body of the Delawares in Leavenworth, Kansas. My Great-Grandfather was in this group.

In the year 1859 our small group of Delaware-Muncie joined the small group of Swan Creek and Black River Chippewa Indians in Franklin County, Kansas, About six miles west of Ottawa, Kansas, now known locally as the Chippewa Hills. At that time the reservation was about six miles long and two miles wide.

I have the Treaty between the United States and the Swan Creek and the Black River Chippewas and the Delaware-Muncie or Christian Indians, made July 16, 1859 and ratified July 9, 1860. My Great-Grandfather, Ignatius Caleb is one of the signers of this treaty.

I have my Great-Grandfathers Bible which is written in the Delaware language. I also have two tribal record books beginning in the year 1870. My Great-Grandfather was on the tribal Council and his signature appears in these books. I also have his original patent to his land, given him in 1900 at the final payment.

My sisters and brothers and I have attended four different Indian Schools: Genoa Indian School at Genoa, Nebr., Seneca Indian School at Wyandotte, Okla., Wahpeton Indian School at Wahpeton, North Dak. and Haskell Indian School at Lawrence, Kansas.

My Great-Grandfather is mentioned several times in the Kansas Historical Collection books and is mentioned as being the last Chief of the Muncie-Delaware.

Enclosed find copy of article taken from the Kansas Historical Quarterly concerning our people.

With this information and the documents I have, we feel we must be Federally recognized.

Sincerely,

Clio Caleb Church

Clio Caleb Church
Muncie-Delaware

# Enrollment List of Chippewa and Delaware-Munsies Living in Franklin County, Kansas, May 31, 1900

C. A. Weslager

IN 1839 a group of Chippewa Indians (also known as Ojibway) settled in what is now Franklin county, Kansas, under the leadership of their chief Francis McCoonse whose Indian name was *Esh-ton-o-quot* ("Clear Sky"). They came from Michigan where they were known as the Swan Creek and Black River bands, remnants of a large tribe that had formerly occupied both shores of Lakes Huron and Superior.[1]

In 1859 a group of Delaware-Munsies (called Christian Indians because they had been converted by Moravian missionaries) moved from the environs of Leavenworth, where they had settled in 1837 among the main body of Delawares, and joined the migrant Chippewa in Franklin county. These Munsies formerly lived on the Thames river in Kent county, Ontario, Canada, although their original homeland was in the upper Delaware valley in New Jersey, Pennsylvania, and New York. White pressures forced them to leave their ancestral lands, and after a sojourn in Ohio, they migrated to Canada about 1792 under the supervision of Moravian missionaries.[2]

In 1861 the combined group of Munsies and Chippewa living in what is now Franklin county numbered 39 males and 46 females, a total of 85 persons.[3] The lands they occupied had been reserved to them by the U. S. government.[4] Twice a year these Indians were

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Prof. C. A. Weslager of Wilmington, Del., is author of 15 books including one entitled *The Delaware Indians, a History* (1972), which tells the story of the Delawares and their removals by steps west—through Kansas, and on to their present home in Oklahoma. The paper published here is developed from his research on this book. Weslager is currently a visiting professor of United States history at Brandywine College, Wilmington, Del.

[1] The Rev. Joseph Romig, "The Chippewa and Munsee (or Christian) Indians of Franklin County, Kansas," *Kansas Historical Collections*, v. 11 (1909-1910), pp. 314-323; *cf.* Grant Foreman, *The Last Trek* (Chicago, 1946), pp. 336-338.

[2] C. A. Weslager, *The Delaware Indians, a History* (New Brunswick, N. J., 1972), Footnotes 4-5, pp. 435-436. When the Munsies and other Indians were converted by the Moravians they were required to sever political and cultural relations with their native tribes. They lived in mission towns where they became known as Christian or "believing" Indians.

[3] Romig, "The Chippewa and Munsee Indians," p. 317.

[4] Anna Heloise Abel, "Indian Reservations in Kansas and the Extinguishment of Their Title," *Kansas Historical Collections*, v. 8 (1903-1904), pp. 99-100. *Cf.* treaty between the U. S. and the Chippewa and Munsie (Christian) Indians July 16, 1859, Charles J. Kappler, ed., *Indian Affairs, Laws and Treaties* (Washington, 1904), v. 2, pp. 792-795.

paid interest on a trust fund held for them by the government, and to facilitate payment and avoid duplication the government maintained an official enrollment list of the eligible recipients. This list was kept up to date through the addition of names of the newborn; all of the Indians, regardless of age, shared equally per capita in the interest disbursements.

On November 8, 1900, the balance of the trust fund was paid in full to the Indians who also received patents for land alloted them in severalty. At this time they were considered as "civilized," because they worked, lived, and dressed like white persons, and native religion and tribal organization belonged to the past.

The final enrollment list dated May 31, 1900, is of genealogical interest because it is a record of the personal and family names of all those individuals then officially recognized as Indians by the government.[5] Historically the list is important because it is, in fact, the last census of the members of a native group which no longer exists as a separate political or ethnic entity. Despite their white increments, a few persons living in the environs of Ottawa in Franklin county still identify themselves as Indians. The majority of the children and grandchildren of those named on the enrollment list have been assimilated into the white population of Kansas.[6]

Preceding the list is a typed letter written by the Indian agent to the Rev. Joseph Romig, a Moravian missionary. An informative note which introduces the list is in Romig's hand. Emendations to the list are also in his hand, but the list proper was written by someone else, perhaps a clerk employed by the U. S. Indian Service. The spelling and punctuation are rendered exactly as they appear.[7]

The letter, which is on a printed letterhead of the Department of the Interior, U. S. Indian Service, reads as follows:

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[5] The list is in the collections of the Carnegie Free Library, Ottawa, Kan., whose permission to reprint is gratefully acknowledged. I am especially indebted to Mrs. Hilda M. Carpenter, library assistant, for her cooperation.

[6] In a personal letter to the writer, dated March 30, 1971, William Albert Caleb of 127 Locust Street, Ottawa, indicated there were then 65 or 70 persons having Indian ancestry living in and around Ottawa. Mr. Caleb's name (William A. Caleb) is shown on the 1900 enrollment list; he was then two years of age.

[7] The writer acknowledges the assistance of Dr. A. R. Dunlap, professor emeritus, University of Delaware, in transcribing the list. The names are numbered sequentially on the list, one column showing a number as of the previous enrollment, and a second the number as of 1900. I have omitted these numbers.

POTTAWATOMIE & GREAT NEMAHA AGENCY,
NADEAU, KANSAS. JUNE 7th, 1900.[8]

*Rev. Jos. Romig,*
*Ottawa, Kansas.*

DEAR SIR:—

I forward herewith copy of enrollment of the payment made May 31st 1900. You will please preserve this for the benifit of the Chippewa and Christian tribe of Indians. If any births or deaths are reported you will make note of the same in the column for remarks, by keeping this record up to date it will be an easy matter to report the census of this tribe.

Very respectfully,
W. R. HONNELL [signature]
U. S. INDIAN AGENT.

There then follows Romig's note:

NOTES ON THE WITHIN PAY ROLL.

Notes on the within Semi annual Pay Roll of the Chippewa and Munsee or Christian Indians of Franklin Co Kansas for the autumn of 1900. But not used because before that time the Final Payment took place whereby those Indians received their Trust Fund in full—some ($43,000) some forty three thousand dollars—or $493 per capita. At the same time (Nov. 8, 1900) they also received patents for their severalty allotments of land.

I, Jos Romig, having been missionary and teacher to those people from March 10th 1862 to June 20th 1871, and again from March 1st 1900 to March 1st 1905 am thoroughily conversant with their names and history.

The Chippewa Indians, under their chief Es-ton-o-quot or Alfred [Francis] McCoonse emigrated from Canada on the Islands near Detroit to this County —Franklin in or about 1836. Then they were a mere handful. In 1859 the Munsee or Christian Indians moved from near Leavenworth and united with the above named Chippewas. They also were but few in number. The Munsees or Christian Indians were originally a part of the Christian Indians who figured so conspicuously in the history of Ohio during the Revolutionary War when ninety of those people were massacred at Gnadenhuetten Ohio, March 8th 1782. (Twenty nine men, twenty seven women and thirty four children. *See Life and Times of David Zeisberger,* pp 537-557.)[9] Later on these Christian Indians located at Fairfield uper Canada. Then in 1837 about 175, the record states, decided to return to the United States and located amongst the Delewares at Munsee some fifteen miles west of Wyandott or Kansas City. Later they lived near Leavenworth—where the Soldiers house now is—until 1859.[10]

At the present date—1916—there are only about half a dozzen of these families left in the Chippewa Hills west of Ottawa Kansas—eight miles. A sketch of these people with some photographs was written out and given to the State Historical Society (*See* Vol. for 1909-10, I think—[11] and also a similar sketch left with H. F. Sheldon of Ottawa for a sometime future history of Franklin County Kansas. On the within enrollment I mark "Ch." for Chippewa and "M" for Munsees. Strange as it may seem there never were any children born or living of any joint marriages between the two bands.

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[8] The Indians living in Franklin county were only one of a number of Indian groups that fell under the jurisdiction of this Indian agency.

[9] For an account of this massacre, *see* Weslager, *The Delaware Indians,* pp. 315-317. Romig incorrectly indicates that all the victims were Munsies, because there were also Unami Delawares, Mahican, Nanticoke, and others among the slain.

[10] The Christian Indians bought four sections of land near Leavenworth from the Delaware Indians for $2.50 per acre, according to Article 13 of the U. S. treaty with the Delawares, May 6, 1854, Kappler, *Indian Affairs,* v. 2, pp. 614-618. On May 29, 1857, the Christian Indians sold the four sections to A. J. Isaacks for $43,500, leaving them homeless, *see ibid.,* v. 2, pp. 312-313. Following this they affiliated with the Chippewa of Franklin county. The "Soldiers house" evidently refers to the Old Soldiers Home.

JOS ROMIG Missionary January 29. 1916.

The list then follows:

| *Names* | *Age* | *Sex* | |
|---|---|---|---|
| Catherine Neff | 27 | F | "Ch." for Chippewa |
| William H. Killbuck[12] | 61 | M | "M" for Munsee |
| Catherine Killbuck wife of do [ditto] | 56 | F | " |
| Rachel Killbuck | 22 | F | " |
| Jeremiah Killbuck son of do | 2 | M | " |
| Francis (Born Feb. 12, 1900) " | 3/12 | M | " |
| Vida June Killbuck | 26 | F | " |
| Nickodemus Herr | 28 | M | " |
| Leo (Born March 28, 1900 Son of do.) | 2/12 | M | " |
| & new one | | | |
| John H. Killbuck[13] | 37 | M | M |
| Katy M. Killbuck Dau of do | 15 | F | " |
| William H. Killbuck Son of do | 13 | M | " |
| Joseph Killbuck " " " | 10 | M | " |
| Ruth H. Killbuck Dau " " | 8 | F | " |
| James Elliott | 49 | M | M |
| George W. Elliott son of do | 15 | M | " |
| Frederick A. Elliott " " " | 11 | M | " |
| Charles H. Elliott " " " | 8 | M | " |
| Sabilla Elliott | 78 | F | " |
| Joab Samuel[14] | 42 | M | " |

[11] He is referring to the article cited in the first footnote above.

[12] A great-grandson of the famous Cpt. John Killbuck, Jr., whose Indian name was Gelelemend ("leader"), and whose baptismal name was William Henry. He was a chief of the Turtle division of the Unami Delawares; *see* Weslager, *The Delaware Indians*, p. 309; Romig, "The Chippewa and Munsee Indians," p. 315.

[13] A son of William H. Killbuck—*Ibid.*, p. 316. John H. Killbuck married Romig's daughter Edith and he became a missionary to the Eskimo in Alaska where he died in 1922. Since Edith was a white woman she was not entitled to any of the tribal money, although her children, having Indian blood from their father, participated in the disbursements.

[14] This name is illustrative of Moravian renaming practices. When an Indian was baptized he agreed to give up his native religion, and he was given a new name of Biblical origin. At first, the convert had only one name, *e. g.*, John, Caleb, Samuel, etc., and as time went on this name became a surname. Thus, Joab Samuel was probably descended from the converted Indian Samuel, just as members of the Caleb family on the list were descended from a Christian Indian named Caleb. In 1870 a visitor to the Kansas reservation referred to Ignatius Caleb as "the Muncy chief."—William Nicholson, "A Tour of Indian Agencies in Kansas and the Indian Territory in 1870," *Kansas Historical Quarterly*, v. 3, (1934), p. 308.

| | | | |
|---|---|---|---|
| John Thomas | 45 | M | "M" for Munsee |
| Rachel E. Thomas | 2 | F | ″ |
| Rose Ann Thomas born Set 20th, 1900 (daughter of John Thomas.) | | | |
| Julia Herron? Bittenbender | 45 | F | "Ch" for Chippewa |
| Harry Bittenbender Son of do | 14 | M | ″ |
| Matilda Herron | 22 | F | Ch. |
| Emeline Herron | 19 | F | Ch. |
| Mary Ann Herron | 23 | F | Ch. |
| Peter Herron | 26 | M | Ch. |
| James W. Donohoe | 8 | M. | Ch. |
| Ellen Sullivan | 29 | F | M |
| William Donohoe | 34 | M | M |
| Charles Louis Donohoe, Son of do | 8 | M | ″ |
| Milo K. Donohoe ″ ″ ″ | 4 | M | ″ |
| Francis M. Donohoe Dau ″ ″ | 1 | F | ″ |
| Theresa Ewing Blackburn | 37 | F | M |
| Enoch Ewing Jones | 19 | M | M |
| Josephine Plake | 46 | F | M husband white man |
| Arthur Clinton Plake, Son of do | 16 | M | ″ |
| Charles Plake | 18 | M | ″ |
| William M. Plake | 20 | M | ″ |
| Ellen Plake | 22 | F | ″ |
| John Plake<br>Son | 24 | M | ″ |
| James Plake | 26 | M | ″ |
| George Veix | 43 | M | ″ Father white |
| Louisa Veix wife of do | 43 | F | ″ |
| Katy Veix Dau ″ ″ | 17 | F | ″ |
| Lucy Veix ″ ″ ″ | 15 | F | ″ |
| Bessie Louisa Veix ″ ″ ″ | 13 | F | ″ |
| Silas Veix Son ″ ″ | 10 | M | ″ |
| Agnes Veix Dau ″ ″ | 9 | F | ″ |
| Cora L. Veix ″ ″ ″ | 7 | F | ″ |
| Julian Veix | 6 | F | ″ [should be M] |
| Rose Ann Veix | 4 | F | ″ |
| Luella Veix | 19 | F | ″ |
| Eliza McCoonse | 25 | F | Ch. |
| Joseph McCoonse | 16 | M | ″ |
| Oscar McCoonse | 27 | M | ″ |

| | | | |
|---|---|---|---|
| Ignatius Caleb | 62 | M | "M" for Munsee |
| Josephine Grinnell | 27 | F | M |
| Rufus Caleb | 35 | M | " |
| Grace A. Caleb Dau of do | 2 | F | " |
| Edith C. " " " | | | |
| born Jan. 22, 1900 | | | |
| Son '02 | | | |
| Joseph McCoons | 50 | M | Ch. |
| Rose Ann Grinnell | 21 | F | M. |
| Sarah Supernan | 39 | F | M. |
| William J. Supernan Son of do | 11 | M | " |
| Jesse A. Supernan " " " | 6 | M | " |
| Josephine Supernan Dau " " | 4 | F | " |
| Jerry E. Supernan Son " " | 2 | M | " |
| Charles L. " " " | | | |
| (Born Dec. 27, 1899) | 5/12 | M | " |
| Elizabeth Spooner | 42 | F | M. |
| Anderson W. Spooner | 17 | M | " |
| Paris J. Spooner, Bro of do | 11 | M | " |
| Irwin W. Spooner " " " | 10 | M | " |
| Charles S. Spooner | 20 | M | " |
| Benjamin F. Spooner | 19 | M | " |
| Daut Catherine | | | |
| Julia Ann Jones | 58 | F | " |
| Joseph Killbuck | 35 | M | " |
| William McCoonse | 37 | M | Ch. for Chippewa |
| Henry L. McCoonse, Son of do | 17 | M | " |
| Helena McCoonse | 3 | F | " |
| Robert McCoonse[15] | 43 | M | " |
| Mary McCoonse Dau of do | 17 | F | " |
| Matilda McCoonse " " " | 10 | F | " |
| Jacob Gokey | 15 | M | Ch. |
| Francis Gokey Bro of do | 13 | M | " |
| Sarah Whitedeer | 23 | F | Ch. |
| Anna F. Whitedeer Dau of do | 2 | F | " |
| Isaac McCoonse | 10 | M | " |

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[15] One of Chief Francis McCoonse's sons was named Robert K. McCoonse, and this may be the same individual, although I have not been able to establish kinship ties for the persons on the list bearing this name. Chief McCoonse, who died January 25, 1868, at the age of 67 years, eight months, is buried in the old Chippewa burying grounds southwest of Ottawa.—Romig, "The Chippewa and Munsee Indians," p. 322. *Cf.* the manuscript interview (undated) by Mrs. J. W. King with Mrs. Josephine Plake in the collections of the Carnegie Free Library, Ottawa. Mrs. Plake, a native speaker, whose name is on the above list, was a daughter of Sabilla Elliott, also on the list.

| | | | |
|---|---|---|---|
| William Caleb | 41 | M | M |
| William A. Caleb Son of do | 2 | M | " |
| Florence E. (Born April 14. 1900) | 1/12 | F | " |
| Thomas Lewis | 56 | M | " |

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 5, 1989

The Honorable Daniel K. Inouye
Chairman
Senate Select Committee on Indian Affairs
Washington, DC 20510

Dear Senator Inouye:

I am writing to inform you of the State of Alaska's views on S.611, a bill to establish administrative procedures to determine the status of certain Indian groups. I respectfully request that this letter be made part of the record of the Senate Select Committee on Indian Affairs' May 5th hearing on the measure.

The State of Alaska endorses the bill's goal of providing a swifter, fairer, and more understandable procedure under which unrecognized Indian groups may demonstrate their eligibility for the special assistance and services already afforded to other tribes and Alaska Native entities. It is reported that, under the present system, petitions have been allowed to languish for eight years or longer, and that some petitioners have spent tens of thousands of dollars attempting to satisfy what many have contended are ill-defined criteria. Such a system is clearly in need of reform, additional resources, or both.

We also agree that those tribes and Alaska Native entities already enjoying a special relationship with the United States should not be required to petition for acknowledgment under the bill's procedures and with your statement upon the bill's introduction that it should not affect those existing relationships in any degree.

We are concerned, however, that the bill in its present form may have the unintended effect of influencing the unsettled legal question of whether Alaska Native villages are tribes in the political sense, and of what sovereign powers, if any, they possess. Recognizing that these unsettled legal questions are the subject of numerous pending lawsuits, your committee has been careful in the past to ensure that legislation under its jurisdiction would not prejudice or advantage either side in those disputes. We respectfully request that the committee continue that course where S.611 is concerned.

There are two major respects in which S.611 in its present form could affect the status of Alaska Natives.

First, section 7(a)(2)(B) is apparently intended only to provide that those who already receive services from the Bureau of Indian Affairs need not apply under the bill in order to continue receiving those services. As noted above, we strongly agree with that proposition. Alaska Native Villages and other entities currently receive BIA services notwithstanding unsettled questions regarding the extent, if any, of their sovereign status. However, the language of the paragraph could be interpreted to mean that inclusion on the list of Alaska Native entities that are eligible to receive BIA services is recognition of sovereign tribal status. Some Alaska Native villages have already made that contention, and the question is currently the subject of litigation.

Second, even though most Alaska Native villages would be exempt from the administrative procedure established by the bill, we believe that, in its current form, it is probable that the courts would adopt the bill's standards in determining whether Alaska Native villages are tribes possessing sovereign governmental authority. In our view, application of some of the bill's standards to that question would be inappropriate, and might result in the extension of sovereign authority to groups that are not "tribes" in the traditional, legal sense of the term.

With respect to both of the above sovereignty-related concerns, we respectfully request that, like legislation considered by your committee in the past, S.611 should not prejudice pending legal disputes regarding the question of Alaska Native sovereignty.

The record of the committee's May 1988 oversight hearing on the acknowledgment process demonstrates a real need for many of the changes S.611 would make. We agree that reasonable deadlines should be imposed on the review process and that standards of proof should be established. We also support reforms which accommodate the fact that there are gaps in historical records, and that a group that has not been part of the dominant society may have difficulty documenting its continuous existence. We believe, however, that the standards proposed in S.611 would go too far in trying to address these very real needs.

While a comprehensive critique of the standards will not be attempted here, we do wish to point out, from our perspective, some of the more worrisome aspects of each of the two sets of criteria established by the bill.

Section 7(c) establishes procedures for the acknowledgment of Indian groups that do not have a history of dealings with the United States government. To be acknowledged under this section of the bill, a petitioner must demonstrate, among other things, that (1) a substantial portion of its members form a "community," defined as "the existence of a network or networks of social interaction among tribal members differentiating members from non-members," and (2) that it has maintained "tribal political influence or some other form of authority over its members as an autonomous entity continually from historical times to the present." These traditional requirements--community and political authority--are two of those required under current law, and we have no objection to them. The bill, however, goes beyond restating or clarifying them, by melding the two criteria into a single one, and thereby making the existence of a community conclusive proof of political authority. This, coupled with the bill's new and more liberal criterion for demonstrating the existence of a community, would, in our view, dilute the traditional requirements noted above to the point of meaninglessness. We appreciate that one of the purposes of this bill is to expedite the equitable resolution of questions regarding tribal status for purposes of federal acknowledgment. However, we question whether this should be accomplished at the expense of established, and what we feel are currently workable, requirements.

Section 7(d) establishes criteria for groups that have a history of dealing with the U.S. government. If the petitioner or its predecessors were parties to, or subjects of, certain kinds of congressional or executive action, it is presumed that the petitioner was previously federally acknowledged, absent proof to the contrary. We question whether such presumptions would, in any number of instances, be valid.

We have particular difficulty with respect to the presumption regarding a petitioner that "was the subject of a federal statute that extinguished, compensated, or confirmed a claim of the petitioner to an interest in land." While compensation for such a claim may often involve a concession of the claim's validity, that is not always the case. That is, claims are frequently compensated in settlement of a contested claim. In our view, it would be inappropriate to presume that some settlements, for example the Alaska Native Claims Settlement Act, constitute acknowledgment of the validity of underlying claims to tribal status.

Section 7(d) would also, in our view, make it unduly difficult to rebut the presumption. Our concern lies with the type of evidence that could be used for rebuttal, as well as with the standard of proof that must be attained. Again, we stress our appreciation for the fact that the bill's sponsors wish to create a more equitable procedure for Indian groups to obtain federal acknowledgment. We are concerned, however, that the provisions of S.611 go too far in shifting the burden of proof. We believe reliable evidence of any character should be admissable to rebut the presumptions arising from Section 7(d), and that a lower standard of proof should be established for rebuttal.

We would appreciate the opportunity to work with the committee in the coming days to develop specific amendments to resolve these concerns regarding S.611 as currently proposed.

Thank you for considering the views of the State of Alaska on this important subject.

Sincerely

John W. Katz

for Steve Cowper
Governor

IDENTICAL LETTER SENT TO ALL COMMITTEE MEMBERS

cc: Senator Ted Stevens
Congressman Don Young

Quinault Indian Nation
POST OFFICE BOX 189 ☐ TAHOLAH, WASHINGTON 98587 ☐ TELEPHONE (206) 276-8211

May 10, 1989

Honorable Daniel K. Inouye, Chairman
Select Committee on Indian Affairs
U.S. Senate
838 Hart Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This letter constitutes the statement of the Quinault Indian Nation on S. 611 and S. 912, bills intended to provide improved standards and procedures for the acknowledgment or recognition of groups as Indian Tribes. We request that this letter be included in the official record of the May 5, 1989 hearing.

The numerous oversight hearings of the Committee provide a significant factual record demonstrating that this is an extremely complex and difficult area to address. There is a well documented litany of complaints concerning the inadequacy of the existing process with respect to the time it takes to process petitions, the seemingly tortuous application of standards, and the lack of adequate resources committed to the existing process. There is significant disagreement as to whether either the existing Acknowledgment standards should be changed at all, or whether evidence levels should be defined for each standard, or whether certain specific evidence should provide for automatic or "expedited" recognition.

Before addressing the substance of these and other questions, it important for us to clearly address several overriding assumptions with respect to this legislative effort. Generally speaking, it is asserted that the views of federally recognized tribes are suspect in this area; for after all we are the "haves" and we are charged with simply selfishly protecting our own turf. In effect, we are charged with violating an Indian norm of sharing and generosity. It is necessary confront these assertions, because we want our views taken seriously.

It is not simply a question of how many Tribes and Indians share the Federal Indian budget. We support a fair and efficient recognition process and support the intent of, as well as some of the concepts in, S. 611. I personally, as Chairman of the National Congress of American Indians in the mid 1970's actively worked for and supported the creation of the recognition process. We have supported and worked with newly recognized tribes in our region to assist them in their transition and development. We have supported the restoration and congressional recognition of tribes across the nation, including the Lumbee Tribe of North Carolina. We believe that our track record is honorable and that our views deserve credibility.

Many of the same historic facts, accidents, and ambiguities that have left some of the petitioning groups outside of the Federal Indian relationship are responsible for the recognition, merger, and creation of some existing Federal recognized tribes and their reservations. It was not the recognized tribes who drafted executive orders or treaties ambiguously, nor was it the tribes that actively moved and consolidated bands and tribes on single reservations. It was the United States that has created these issues. These reservations which today contain functionally, factually, and we believe legally, consolidated tribes are placed in grave danger by any process that may provide for independent recognition of one of the groups or the descendants of such groups that are part of the today's consolidated reservation tribes. The United States should not cure the problem of groups claiming to be Indian tribes, with solutions that change the legal status of existing tribes and their reservations.

This problem is very prevalent in the State of Washington and exists on the Quinault Indian Reservation. A brief history of the Quinault Indian Reservation may be helpful. In 1855 the U.S. attempted to negotiate a treaty with the Quinault, Queets, Chehalis, Chinook, and Cowlitz; that negotiation did not succeed because of the objections of the Chelalis, Chinook, and Cowlitz to the proposed consolidation of all tribes in Quinault territory. Subsequently in 1855, the U.S. negotiated a treaty with the Quinault, Queets, Quileute and Hoh tribes. The tribes ceded their territory and the U.S. agreed to reserve a tract or tracts sufficient for their wants; the treaty provided that the U.S. had the authority to consolidate the tribes with other friendly tribes. In 1861 approximately 10,00 acres were set aside at the mouth of the Quinault River; only the Quinault located on the reservation. The U.S. never concluded a treaty with the Chinook, Chehalis, or Cowlitz. The U.S. did, however, take their aboriginal lands. Two reservations were set aside for these tribes. The Chehalis Reservation was set aside in 1864 for the Chehalis, Chinook, Cowlitz, and other Indians. The Shoalwater Bay Reservation was set aside in 1866 for the "[r]emnants of the Chinook Bands and Lower Chehalis." In 1873, some 200,000 acres were added to the Quinault Reservation -- reserved for the use of the "Quinaielt, Quillehute, Hoh, Quit, and other tribes of fisheating Indians of the Pacific Coast ... ." Although the U.S. still hoped to consolidate tribes at Quinault, other tribes generally refused to locate there. In 1889, the United States provided a separate reservation for the Quileute; and in 1893 a separate reservation was provided for the Hoh. When the Quinault Reservation was first alloted in 1905 allotments were made only to reservation residents. In 1911 the special Quinault Allotment Act, provided that reservation land remaining after allotment of resident Indians could be alloted to all members of the Quinault and Quileute, or other tribes of Indians affiliated with Quinault and Quilleute tribes who elect to take allotments on Quinault rather than on the reservations set aside for them. In 1924, and again in 1931, the U.S. Supreme Court determined that Quinault forested lands could be alloted and that individuals of Chehalis, Chinook, and Cowlitz ancestry were also entitled to allotments.

As a result almost the entire reservation has been alloted to individuals of Quinault, Quileute, Queet, Hoh, Chehalis Chinook, and Cowlitz ancestry. Today, the membership of the Quinalult Indian reservation is open to anyone who is a quarterblood or more descendant of one of these groups (or combination therof) and not a member of another federally recognized tribe. And in fact, the Quinault Indian Nation is now a composite of these fish eating tribes of Washington.

The recognition of any of the above groups separately , under the analysis followed in Puzz v. United States, could inadvertently put into question of the ability of the Quinault Indian Nation to govern its reservation and protect its assets. In spite of the fact that both Congress and the Executive branch consistently recognize the Quinault Indian Nation as the governing body of the Quinault Indian reservation, litigation challenging our authority has already been filed. Congress most recently confronted the issue of the status of the Quinault Indian Nation in P.L. 100-638 and affirmatively confirmed our status.

The Committee is clearly aware of the impact of the Puzz case with respect to Hoopa Valley Indian Reservation, which resulted in P.L 100-580, the Hoopa Yurok Settlement Act, where Congress legislatively divided up the Reservation, allocated resources between the competing interests, and provided for federal payments. The recognition of a splinter group, a remnant, a group of less than quarter blood descendants, or certain other groups, as an Indian Tribe for purposes of the Federal-Indian relationship, will encourage Puzz type litigation and results in consolidated reservations. Congress may have to face the Hoopa Yurok Settlement over and over in other reservation areas.

We do not recommend that these petitioning groups be barred from being recognized as an Indian Tribe. If any of these groups can meet the existing objective criteria contained in S. 912 they should be recognized. Or perhaps the approach of restoration legislation, where equity requires action, would be a good alternative to explore. What we do recommend is a "savings clause" that holds existing tribes harmless with respect to their land bases, assets, and their powers of self-government. In this respect S. 912 section 6(e) is much more adequate than section 12 (e) of S. 611. We additionally recommend that the definition of splinter groups be refined to include groups that are composed of descendants of individuals eligible for membership in recognized tribes.

We should also point out that the requirements of autonomy in S. 611, section 7 (a)(2) and section 7(c)(3) are inadequate to resolve our concerns because autonomy can shown by simply demonstrating that "the petitioner formed a community at that time." When this standard is combined with the evidentiary standard for continuity in section 4 (5) which permits gaps of up to fifty years for a petitioning group, the autonomy standard may be meaningless.

We agree that the existing generational evidentiary standard makes little sense in many of the situations presented to the Committee. For example, on the east coast, the earliest contact point could well be the 17th century and an Indian petitioner would be dependent on whether some literate person in the european settlement recorded the Indian existence with any frequency. In parts of the country where Indians hid their existence in order to survive, such as in California, the generational standard is inappropriate. The overriding problem is that there are many diverse historical situations, and problem solving in one area should not create new problems in other area. Perhaps the evidentiary standard should be different before the mid or late nineteenth century when data was sparse, and more stringent after that point.

Our attorneys have provided Committee staff with detailed comments relative to the working drafts of S. 611 and we will not repeat those comments here. Instead we will focus the remainder of our comments on several distinct issues that arose at the May 5th hearing.

The question of whether a treaty relationship should result in either automatic or expedited recognition was raised at the hearing. Treaties are of course a critically important element in the Federal Indian relationship. The question seems simple but in fact is complex; the inquiry is who has the treaty relationship and who, today of various possible descendant groups, is the legally constituted successor-in-interest to the treaty relationship entity. To the extent that this inquiry can be performed on an expedited basis, it should be.

Another issue of some concern is whether existing negative determinations as to recognition should be final or automatically reversed in the legislation. While we do not subscribe to the view that all court or administrative determinations should be final, we do think that overturning such decisions requires a case-by-case determination. Congress has periodically albeit infrequently overturned court decisions where injustice has been demonstrated. Generally the parties seeking to overturn court decisions have had to prove their cases. We do not think the judgement reached, for example, by the late federal district court Judge George Boldt, in U.S. v. Washington, relative to tribal status, should be reversed without a case-by-case review by Congress.

We agree that an appeal procedure should be provided with respect to determinations on recognition petitions. The existing system utilized by S. 912 avoids setting up a new process with associated new costs as contemplated in S. 611. Although peer review would be beneficial to the anthropologists and other technicians employed in the recognition process, it is not necessarily an appropriate appeal process. In a sense,it compounds what we think is a flaw in the existing process. Anthropologists, historians, etc. can help to evaluate evidence of tribal existence, but the decision relative to recognition is a legal/political decision and should not been made by the technicians. It is interesting to note in some of the technical testimony of anthropologists who work in this area, that the "term" tribe has a different meaning for anthropologists than it does in Federal-Indian law. To anthropologists, a tribe is a point in the evolution of units of control starting with the family and seemingly ending with the nation-state. In federal Indian law, a tribe can be a nation, a band, a pueblo, a rancheria, a village, whatever, as long as it is the political unit of the Indian people.

One final general point, while we support efforts to force any federal bureaucracy to act in timely manner, one of the great failures of the existing process, automatic recognition, as provided for in S. 611 for missed deadlines does not seem to be a realistic remedy that will enhance passage of the overall package. Allowing petitioners to go directly to court for a de novo review of their cases is good remedy for agency inaction. S.912 however only provides the de novo remedy at the end of a six year period; this seems too restrictive. Perhaps a good middle ground would be to allow for de novo reviews at several points in the administrative process or wherever a petitioner can demonstrate that the agency consistently misses statutory deadlines.

As mentioned earlier, we have made our technical comments available to the Committee staff. We hope that we too will have the opportunity to participate in the process to obtain a consensus bill that will allow petitioners to be fairly and quickly heard, while at the same time protecting the existing rights and relationships of Indian tribes. Thank you for your consideration of our views.

Sincerely yours,

Joseph De La Cruz

Joesph De La Cruz,
President

ALASKA FEDERATION
OF NATIVES, INC.

411 W. 4th Avenue, Suite 301 • Anchorage, Alaska 99501 • Phone (907) 274-3611

May 18, 1989

Honorable Daniel K. Inouye
Chairman, Senate Select Committee
on Indian Affairs
United States Senate
838 Hart Office Building
Washington, D.C. 20510-6450

Dear Senator Inouye:

I write to express support for Senate Bill S. 611, a bill to establish administrative procedures to determine the status of certain Indian groups, and to offer AFN's suggestions for improving the bill.

The Committee is well aware of the problems which have confronted unrecognized Native-American groups seeking official federal recognition from the Department of the Interior. Generally speaking, we believe S. 611 will go a long way toward overcoming these unnecessary obstacles.

In Alaska the federal acknowledgement process is largely unknown, for the simple reason that most (but not all) of the Alaska Villages[1] have long been acknowledged to be "tribes" in the legal sense of the word, and on that basis have received federal services provided to tribes and tribal members, and have administered governmental programs through funding provided by the tribes themselves, the Department of the Interior, the Indian Health Service, and the Adminstration for Native Americans. This legal status as "tribes" has recently been reaffirmed by the Ninth Circuit Court of Appeals in Native Village of Noatak v. Hoffman (decided March 30, 1989).

S. 611 speaks directly to Alaska tribes in section 7(a)(2)(B). This subsection provides that the petitioning procedure does not apply to:

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[1] There are also presently three regional tribes in Alaska. Two of these (the Kenaitze Indian Tribe and the Inupiat Community of the Arctic Slope) were formed under the IRA. The Tlingit and Haida Central Council is the product of judicial and Congressional settlement of a pre-ANCSA land claim based on aboriginal title.

> an indigenous nation, tribe, band, village, community or organized Indian group acknowledged as an Indian Tribe by the Federal Government on the basis of the lists published in the Federal Register by the Assistant Secretary of the Interior for Indian Affairs on July 10, 1986, of Indian tribal entities, including Native tribal entities within the State of Alaska, and including tribes that have been acknowledged by the Federal Government between that date and the enactment of this Act that are recognized and are eligible to receive services from the Bureau of Indian Affairs.

The 1986 list referred to in this paragraph is one of a series of periodic lists issued by the Department of the Interior, setting forth those entities which are already acknowledged to be "tribes" and therefore are, among other things, the beneficiaries of special federal services provided to Indian tribes. S. 611 does not refer to a similar list from the Federal Register published on December 29, 1988 and we agree with this approach. The December 1988 list is a confusing amalgam of tribes and profit-making Native corporations established under the Alaska Native Claims Settlement Act of 1971. A reference to the 1988 list would therefore be inappropriate as a reference to tribes already acknowledged to be legal "tribes."

Although we agree that the tribal entities referred to in Section 7(a)(2)(B) should not be required to go through any petitioning procedure, we also agree that certain categories of other entities should likewise not be required to go through petitioning procedures. For instance, entities listed in Section 7(d)(1)(C)(v) which organized under Section 16 of the Indian Reorganization Act of 1934, as amended, should be exempt from the petitioning procedures. Likewise, entities under subsection (vii) of the same section which were "the subject of a Federal Statute that extinguished, compenstated or confirmed a claim of the petitioner to an interest in land" should not be required to go through any petitioning procedure. Such Congressional recognition of tribal status is conclusive and the end of the matter.

On this point we disagree with the position taken by the Governor for the State of Alaska that the Alaska Native Claims Settlement Act (ANCSA) extinguishment of Alaska aboriginal claims is an insufficient basis for the federal recognition of tribal status.

To the contrary, the legislative history of ANCSA demonstrates that Congress believed clearly that it was dealing with tribal claims.[2] This too was the holding of the United States Supreme Court in the famous Tee-Hit-Ton case and was recently reaffirmed by the Ninth Circuit Court of Appeals in the Noatak case.

It may well be that Native villages exist that are not within the scope of the criteria noted above. That is, they may not have been included in a previous Secretarial list of tribes, they may not have been organized under the Indian Reorganization Act, and they may not have been involved in ANCSA. Such villages will benefit from the provisions in Section 7.[3] In such instances, however, we believe that the minimum 85% requirement in Section 7(d)(1)(A) is unrealistic given the unique situations found in Alaskan Villages. In most places, the types of records referred to in this subsection are simply non-existent.

Subsection 7(d)(1)(B) poses another issue in Alaska. Several pieces of self-determination legislation define the ANCSA village and regional corporations as "tribes". Thus, the membership of any village petitioning under this section will almost certainly be enrolled to another Indian "tribe", if they are shareholders in a village or regional corporation. One way to resolve this problem would be to include a definition of the term "tribe" in the definition section. For Alaska Natives, an adaptation of the definition of "Indian tribe" under the Indian Child Welfare Act [25 U.S.C.S. § 1903(8)] would probably suffice. The main thing is that the definition should not include corporations within its scope. Another alternative would be 8844to delete this dual enrollment criteria, unless it is necessary for some specific nationwide purpose.

We also disagree with the role that the Secretary would play under appeals under Section 10 of S. 611. The Secretary's role as arbitrator between the Director and the Appeal Panel risks injecting political considerations into what should be a purely legal and factual determination. As in many other administrative areas, we believe that the decision of the Appeals panel should be final.

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[2] The Tlingit and Haida Central Council established under the Tlingit and Haida judgment legislation between 1935 and 1970 is another example in Alaska.

[3] However, we have also identified 37 or so villages which should have been included in the 1986 list. These villages should not have to pursue FAP acknowledgment either.

The intent of Section 11(b)(5) is also not clear, nor is it clear how this list (to be provided to Congress) will differ from the publication of July 10, 1986. We don't think the last subordinate clause referring to "Alaska Natives" and beginning with the word "including" and ending the with word "council" adds anything to the requirement and should be deleted.

Finally, the definition of "Indian"in S. 611 needs to be revised to include any Alaska Native or "Descendent of a Native". This will bring the definition in line with the new term ("Descendent of a Native") added as subsection 3(r) of ANCSA by the Alaska Native Claims Settlement Act Amendments of 1987 [P.L. 100-241; 101 Stat. 1788, 1789, 43 U.S.C.S. § 1602(r)]. The effect of those amendments is to permit descendants of Natives, under certain circumstances, to share in the benefits of ANCSA, including the full exercise of voting rights as shareholders. The current definition of "Indian" in S.611 would limit the application of the term to Alaska Natives of one-quarter degree blood or more and is inconsistent with the approach Congress has taken in the 1987 ANCSA amendments. Adding "Descendent of a Native" to the definition of "Indian" in S. 611 will correct this defect.

In closing, we note that the Alaska Governor suggests in his letter to the Committee that the treatment of Alaskan tribes in the bill as described above will preempt the role of the judiciary in determining the extent of the tribal governmental powers and immunities possessed by particular Alaska Village Tribes. This is simply wrong. While courts frequently play this role, S. 611 does not preempt such determinations any more than it preempts similar determinations for tribes elsewhere in the United States. Although certainly the tribe must exist as a legal entity before it may prevail in asserting a particular governmental power or immunity, tribal status is but one of many factors which are considered together by the courts in determining questions of tribal sovereignty.

S. 611 is scrupulously silent on the question of tribal powers. As such, it implicitly recognizes that the extent of tribal powers and immunities varies from tribe to tribe across the country, and in some instances varies quite considerably. In large part this is due to the unique history which each tribe has experienced in its dealings with the federal government (including Congress). We believe that S. 611 is appropriately silent on particular powers and we urge the Committee to retain the approach taken consistent with the views expressed in this letter.

We thank you for the opportunity to present these views. If we can provide additional information please let us know.

Sincerely,

Janie Leask

Janie Leask
President

FILE COPY S 611
fc

North Carolina Indian Adventure Inc.
NON-PROFIT ORGANIZATION
Phone (919) 893-2512
Bunnlevel, N.C. 28323

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3rd. Vice President
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Secretary/Treasurer

Tribal Council
KEN MARSH
D.H. BAKER
KENNITH SUGGS
BRUCE HOLT
LEROY O'NEAL
(Liaison)
Hattadare
Indian Nation

May 1, 1989

To " United States Senate
Select Committe
On Indian Affairs
Washington, D.C

From " Hattadare Indian Nation
James N.Iowery. Sec/ Treasury
Bunnlevel.N.C

Re " S.611. Bill.

Dear Committee;

This is to acknowledge receipt of Bill611. The Hattadare committee of the Hattadare Indian Nation,have viewed and approved same.

This is not apetition for Federal Recognition,but for the record for the select committee. We appreciate this effort by the committee to help in this far over-due need for the American Native.

The Hattadare Indian Nation of North Carolina,will be sending a petition for Federal Recognition as soon as it is completed.

We will apperciate the attention of the committee at this time. please acknowledge receipt of this letter. Thank you very much.

Sincerely.

James N. Lowery DD
James N.LOwery, DD

- 30 copies

**KODIAK TRIBAL COUNCIL**

**Post Office Box 1974 Kodiak, Alaska 99615**

May 3, 1989

The Honorable Daniel Inouye, Chairman
Senate Select Committee on Indian Affairs
722 Hart Street
U.S. Senate Office Building Room 828
Washington, D.C. 20510

Dear Senator Inouye and Members of the Senate Select Committee on Indian Affairs;

It is my understanding that a hearing will be held on May 5, 1989 on S.611 "Indian Federal Acknowledgment Administrative Procedures Act of 1989." The Kodiak Tribal Council who represents the Members of the Shoonaq' Tribe of Kodiak, Alaska would like this letter to be entered into the record on S. 611. The Kodiak Tribal Council strongly supports the passage of S. 611 as introduced. The bill is critical if the Federal Acknowledgment Procedures (FAP) process is to be approved in any meaningful way.

The process in the past has led to tremendous delays in the Interior Department, and has had very little success by petitioning tribes. I applaud you for introducing S. 611.

In regards to Alaska, I think the S. 611's provisions make it clear that Alaska villages do not have to go through the FAP process because they previously had acknowledged the tribes. This is not only correct in terms of history and dealing with Congress including the Alaska Native Claims Settlement Act which settled tribal claims on aboriginal title, but it is consistent with the recent Ninth Circuit Court of Appeals in which the case is known as Noatak vs. Notti, whereby the Ninth Circuit Court decided clearly and unequivocally that villages in Alaska are tribes. In the past it is my understanding that Congress and the Alaska Delegation that legislative enactment should be neutral on tribal sovereignty issues in Alaska, and that Legislative enactment should not be influenced in one way or another, how these issues are resolved in the court. The Kodiak Tribal Council disagrees with that, infact now the courts have spoken and continuing neutrally in the face of a court decision holds that Alaska villages are tribes would actually not be neutral, but would be partisan and antitribal. For this reason I strongly oppose any effort to change any aspect of the bill that relates to Alaska, or carving out any Alaska provisions in the bill beyond what is already stated.

**Representing the Members of the Shoonag' Tribe, Kodiak, Alaska**

Mr. Inouye, this bill really is addressing the heart of tribal sovereignty in Alaska. It deals with our status as tribes and as tribal people, and the bill must go through if the Alaska villages or tribes are to be protected, and it is the Federal Governments trust responsibility must be respected and carried out! We know that you will address our concerns.

Very Truly Yours,

Margaret Roberts

Margaret Roberts
Chairman

DANIEL K. INOUYE, HAWAII, CHAIRMAN
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MINORITY STAFF DIRECTOR/COUNSEL

United States Senate
SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

May 3, 1989

MEMORANDUM

TO: CHAIRMAN INOUYE, VICE-CHAIRMAN McCAIN AND MEMBERS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

FROM: Richard Monette, Staff Attorney

RE: May 5, 1989 hearing on S. 611, the Federal Acknowledgment Bill

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## BACKGROUND

Since the 1930s, the Bureau of Indian Affairs has routinely made determinations of which Indian groups were eligible for acknowledgment of a government-to-government relationship with the United States. The 95th Congress established the American Indian Policy Review Commission which conducted extensive research on unrecognized and unacknowledged Indian groups. It was the Commission which first expressed the need for an independent office to review petitions for acknowledgment under a consistent set of standards without prejudicing those groups which have had a history of dealing with the United States on a government-to-government basis.

The authority of the United States to recognize or terminate a relationship with the Indian tribes rests solely with the Congress and has never been delegated to the Executive Branch. Nevertheless, in response to proposed legislation in 1978, the Bureau of Indian Affairs issued regulations for processing petitions for acknowledgment. The Senate has held three oversight hearings on the "Federal Acknowledgment Process," in 1978, 1983, and 1988. Testimony provides that the existing process has become underfunded and overburdened, for both the petitioners and the Department.

Since the BIA adopted its regulations in 1978, approximately 110 petitions have been filed. They represent a membership population of about 136,000. Nineteen of the 110 petitions have received final decisions in the last ten years. Of those nineteen, eight petitioners have been acknowledged and eleven have been denied acknowledgment. This represents an average decision rate of two petitions per year, at which rate it would take ten years to finally decide those petitions ready for active consideration and forty years for all petitions.

The BIA's Branch of Acknowledgment and Research is budgeted under the Central Office Tribal Government Services Unit, which has had an average of about 30 FTE and annual costs of about $1.3 million, of which about one-third has been devoted to acknowledgment and research. In other words the process has cost about $450,000 per year or about $250,000 for each final decision.

The federal courts and the Congress have also acknowledged the government-to-government relationship between the United States and certain Indian groups. Evidence suggests that different petitioners have had to meet different and inconsistent standards. For example, the first two petitioners to be acknowledged submitted 30 page, double-spaced, petitions. Today it is not uncommon for a petitioner to submit upwards of 1000 pages of evidence, only to be asked to provide further documentation. There is also ample evidence that the time deadlines under the existing process are seldom adhered to.

## OBJECTIVES OF S. 611

S. 611 provides a statutory basis for establishing administrative procedures to clarify the relationship between the United States and certain Indian groups. It will create an independent Office of Federal Acknowledgment that is intended to remain free from political pressures. It will authorize funds to carry out the purposes of the Act and to assist petitioners in their research within a six year timeframe. It provides for input from any interested party, an appeals panel, Secretarial discretion, and judicial review. It allows those petitioners whose acknowledgment has been denied under the inconsistent and burdensome existing process another opportunity to petition using the consistent and fair standards under which all other petitions will be judged. The bill will set up two separate procedures, one for those petitioners which have had a documented government-to-government relationship with the United States in the past but whose status has become uncertain through time, and the other for those petitioners which have never had such a documented relationship with the United States.

Specifically, section 7 sets out the guidelines for determining to whom the Act will apply, the standards to which a petition must conform, and two separate sets of criteria by which petitions will be reviewed. The Act will not apply to existing acknowledged tribes nor to splinter groups or factions of existing acknowledged tribes. The criteria for acknowledgment under S. 611 generally reflects the criteria of the existing acknowledgment process under the Bureau of Indian Affairs. The criteria under subsection 7(c) applies to those petitioners with no substantial history of government-to-government dealings with the United States. The criteria under subsection 7(d) applies to those petitioners with a substantial history of government-to-government dealings with the United States, including treaties, specific statutory references, and administrative approval of tribal constitutions.

The provisions of S. 611 do not apply to groups that are currently acknowledged, which specifically include Alaska native tribal entities. The purpose of S. 611 regarding Alaska Natives is to comport with existing case law, actions of the Executive Branch, and past legislation. To the extent that the status of Alaska Natives is unclear, S. 611 is not intended to address that issue. The Ninth Circuit Court of Appeals has recently held that Alaska Villages are tribes for the purposes of bringing legal claims. Native Village of Noatak; Circle Village, and Native Village of Akiachak v. David Hoffman (State of Alaska), Nos. 87-4310, 87-4374 (April 3, 1989). The Department of Interior has included Alaska Villages on its list of Federally recognized tribes which is essential for extending services on that basis. However, the Department, for reasons that are unclear, left thirty-three native villages off such lists. Under the current BIA regulations these thirty-three villages are eligible to petition for federal acknowledgment. S. 611 retains that eligibility status for these villages. Otherwise, in short, S. 611 is intended to remain neutral on issues concerning the status of Alaska Natives.

A petitioner may elect to have its petition reviewed under either subsection 7(c) or 7(d). Those petitioners that meet the threshold criteria for proceeding under subsection 7(d) are presumed to have met the criteria for acknowledgment, the burden of proving otherwise shifting to the Department. In order to deter frivolous attempts to petition under subsection 7(d), the criteria under this subsection are in some respects more difficult to meet, and those petitioners that choose to petition under subsection 7(d) and subsequently fail to meet the threshold criteria will be placed at the bottom of the list to petition under subsection 7(c).

The bill also addresses a very fragile issue, the balance between the political status of a tribe and the racial composition of its members. The legal relationship between the United States and the tribes is not racial in nature, but political. Nevertheless, in order to maintain the integrity of the Indian tribes in the eyes of society at large, many existing acknowledged tribes understandably believe that the petitioners must be comprised of those who can prove their Indian ancestry on a racial basis. Thus, in addition to meeting the other seven stringent criteria for acknowledgment, petitioners must also prove their Indian ancestry so that the process is restrictive and maintains the integrity of the federal acknowledgment process and of the existing federally acknowledged tribes.

Sections 4(2), 7(a)(2)(A), and 7(c)(3) are intended to further ensure the integrity of the process, in the political rather than the racial realm. These sections require that the petitioners have exercised "autonomy", a word which has a comprehensive anthropological meaning too extensive to be included in the bill in full. The bill's report will expand on the definition already provided, in essence saying that autonomy requires more than merely one family, extended family, or splinter group; rather, it requires a distinct cultural group which has exercised governance to the inclusion of all those within its recognized sphere and to the exclusion of those outside its sphere, engendering a distinct intra-societal pattern of political, social, religious, and economic means.

Other guidelines under the bill closely reflect the regulations under the existing process. A petition for recognition under Section 7(c) requires: 1) a copy of petitioners current governing documents; 2) a list of all known members; 3) documentation that a petitioner and its members have been identified as Indian; 4) that a substantial portion of petitioner's members presently form a community in social science terms; 5) that the petitioning group exercised tribal political influence as an autonomous entity from historical times to the present; 6) that at least 75 percent of its current members be lineal descendants of that historical tribe; and 7) that its members are principally composed of persons not enrolled in any other tribe.

Under Section 7(d), those petitioners for acknowledgment that have already been recognized as tribes by the United States at some point in history also must meet stringent guidelines. They must provide governing documents and a list of all members. Eighty-five percent of their current members must be able to prove descendance from that tribe and their members must not be members of another tribe. Finally, if the Department can prove that the petitioner failed to maintain its autonomy continually since historical times or presently, the petition will be denied.

Most of the tribes that will be eligible to petition under section 7(d) have entered into treaties in which the United States recognized their sovereign authority to cede their territory. In most instances, the Congress has not expressly abrogated any treaties with these tribes. S. 611 reflects the legal basis of federal Indian law that treaties were more than mere vehicles with which to acquire tribal land and rights, but that also they carried with them a solemn obligation to honor the continued governmental relationship between the two sovereigns. In the words of Chief Justice Marshall in Cherokee Nation v. Georgia, "A people once numerous, powerful, and truly independent . . . have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue." And Justice Johnson concurring, "Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them."

Section 8 sets out time deadlines for rulings, other administrative actions, and for the petitioner's responses, and provides enforcement mechanisms which apply to the review of petitions submitted under section 7(c).

Section 9 sets out time deadlines for rulings, other administrative actions, and for the petitioner's responses, and provides enforcement mechanisms which apply to the review of petitions submitted under section 7(d).

Sections 8(e) and 9(d) provide authority for any interested party to submit written comments on preliminary rulings. This provision is drafted in order to strike a careful balance between two legitimate concerns: 1) allowing any party that may be impacted by the finding to participate, and 2) safeguarding the process from third party groups that may either adamantly oppose or support an individual petition for purely political reasons.

Sections 8(f) & (g) and 10(c)(1)(2)&(3) provide that if the Review Panel agrees with the ruling, then the ruling will be final for the purpose of judicial review. If the Panel disagrees with the ruling, the ruling goes to the Secretary, whose decision is then final for the purposes of judicial review.

Along these lines, section 8(g) and (i) and sections 9(f) and (g) give force and effect to the established timelines in the bill. The lack of adherence to timelines under the current regulations prove that timelines must be given such force and effect in order to be meaningful. Thus, if the petitioner does not respond in a timely manner to an adverse preliminary ruling, that ruling shall become final and not subject to judicial review. Likewise, if the Department does not meet the deadlines for making rulings, the petitioner shall be deemed to be acknowledged.

## Legislative History

S. 611 was introduced on March 15, 1989 by Senator Inouye for himself and Senators Breaux, D'Amato, Dodd, Hatfield, Johnston, Levin, Packwood, Pell, Riegle, Sanford, and Shelby, and was referred to the Select Committee on Indian Affairs. The Committee held a hearing on S. 611 in Sacramento, California on April 28, 1989. There is no companion bill in the House.

Re: April 28, 1989 hearing held in Sacramento, California

Chairman Inouye conducted field hearings in Sacramento, California on Friday, April 28th. The first two hour session addressed S. 611 and other federal acknowledgment issues specific to California Indian groups. The second two hour session addressed other concerns for California tribes regarding health, education, religious freedom, and other issues.

Twenty seven witnesses representing both acknowledged and unacknowledged tribes presented oral testimony during the first session on Federal acknowledgment. The testimony showed overwhelming support for S. 611 among California Indians. Two witnesses expressed some opposition to S. 611. Many suggested modifications which would make the process more accommodating to the unique history and other circumstances peculiar to California Indian groups.

Nearly every witness provided the backdrop of California history and how that history has affected their petitions for acknowledgment. Basically, the United States negotiated eighteen geographically based treaties with the Indians of California which purported to cede virtually all land within California. However, the Senate refused to ratify the treaties. Not all the California tribes signed on to the treaties although all the land in California was ceded. Not all the California tribes abided by the terms of the treaties. Because the treaties were not ratified, the newcomers to California did not adhere at all to the terms of the treaties. Several military reservations and "rancherias" were set aside to temporarily safeguard and house the dispossessed Indians from certain tribes. Many Indians, usually the homeless and indigent, relocated to the rancherias and their tribes were thus recognized as being from that rancheria even though a larger number of that tribe may have remained off the rancheria, either because they did not sign the treaties, because they refused to abide by them, or because they received an allotment or payment and attempted to assimilate into the general population. Also, several different groups found themselves on the same rancherias, sometimes representing the main body of the tribe and sometimes not. Intertribal marriage seems to have become the rule rather than the exception.

The witnesses made several recommendations to address these unique circumstances. They suggest an entirely separate bill that would specifically recognize the California groups. Alternatively, they suggest a separate provision of this legislation that would allow the California groups to petition simultaneously or as a group, using the same documentation. They strongly support the provision for a separate track for groups with ratified or unratified treaties.

## SECTION-BY-SECTION ANALYSIS OF THE BILL

Section 1 provides that the act may be cited as the "Indian Federal Acknowledgment Administrative Procedures Act of 1989".

Section 2 sets forth the findings of the Congress.

Section 3 sets forth the purposes of the Act.

Section 4 provides the definitions of terms as used in the Act.

Section 5 provides for the establishment within the Department of Interior of an "Office of Federal Acknowledgment".

Section 6 provides for a list of candidates from which will be chosen a panel to review administrative rulings.

Section 7 sets out the guidelines for determining to whom the Act will apply, the standards to which a petition must conform, and two separate sets of criteria by which petitions will be reviewed.

The criteria under subsection 7(c) applies to those petitioners with no substantial history of government-to-government dealings with the United States.

The criteria under subsection 7(d) applies to those petitioners with a substantial history of government-to-government dealings with the United States, including treaties, specific statutory references, and administrative approval of tribal constitutions.

Any petitioner who meets the threshold standard under subsection 7(d) may elect to have its petition reviewed under either subsection 7(c) or 7(d), since the criteria for review under 7(d) are in some respects more difficult to meet.

Those petitioners that meet the threshold criteria for proceeding under subsection 7(d) are presumed to have met the criteria for acknowledgment, the burden of proving otherwise shifting to the Department. In order to deter frivolous attempts to petition under subsection 7(d), those petitioners that choose to petition under subsection 7(d) and subsequently fail to meet the threshold criteria will be placed at the bottom of the list to petition under subsection 7(c).

Section 8 sets out time deadlines for rulings, other administrative actions, and for the petitioner's responses, and provides enforcement mechanisms which apply to the review of petitions submitted under section 7(c).

Section 9 sets out time deadlines for rulings, other administrative actions, and for the petitioner's responses, and provides enforcement mechanisms which apply to the review of petitions submitted under section 7(d).

Section 10 sets the out the procedures and standards for reviewing appeals made by the petitioner.

Section 11 requires the Director to submit to the Congress a report on the status of all petitions currently on file, and an annual report listing all currently acknowledged tribes, all submitted petitions, and an explanatory progress report on all petitions upon which actions have been taken.

Section 12 provides general provisions on the relationship between tribes acknowledged under this Act and the United States and other tribes, and other provisions.

Section 13 authorizes a grant within the Administration for Native Americans to support petitioners in their research and tribal functions while their petitions are under review.

Section 14 transfers all pending petitions to the new office, allows for petitioners denied under the previous process to re-apply, and provides for a transitional period of two years with some modified time deadlines.

Section 15 authorizes appropriations necessary to carry out the provisions of this bill.

## WESTERN ALASKA TRIBAL COUNCIL

## RESOLUTION 89-02

A RESOLUTION IN SUPPORT OF SENATE BILL 611, WITH TECHNICAL CHANGES SPECIFIED IN EXHIBIT 1.

WHEREAS, The Western Alaska Tribal Council is comprised of Presidents of the 19 tribal government of the Bering Straits region of Alaska; and

WHEREAS, The members of the Western Alaska Tribal Council are federally recognized tribes; and

WHEREAS, The Federal Acknowledgement process set out in federal regulations in burdensome and difficult for Alaska tribes to understand or to comply with; and

WHEREAS, There is now pending in the United States Senate a bill, S. 611 that would make the Federal Acknowledgement Process easier to use; and

WHEREAS, S. 611 correctly exempts all Alaska tribes on the 1986 BIA list of recognized tribes from having to follow the Federal Acknowledgement process; and

WHEREAS, S. 611 also correctly acknowledges that Alaska Native entities on that list are federally recognized tribes; and

WHEREAS, Some villages in this region were improperly left off the 1986 BIA list; and

WHEREAS, Those villages should not have to go through the Federal Acknowledgement process; and

WHEREAS, There remain some drafting difficulties with the bill that keep it from being most useful to those villages;

NOW THEREFORE BE IT RESOLVED THAT the Western Alaska Tribal Council supports the simplified Federal Acknowledgement Procedures contained in S. 611, subject to the technical changes set out in Exhibit 1 to this resolution; and

BE IT FURTHER RESOLVED THAT the Council supports the reference in S. 611 to the 1986 BIA list; and

BE IT FURTHER RESOLVED THAT the Council calls upon Senate also to exempt from the Federal acknowledgement process the villages in Alaska that were improperly left off the 1986 BIA list, including Mary's Igloo, Council and Solomon.

CERTIFICATION

I hereby certify that the foregoing resolution was adopted by the Western Alaska Tribal Council at a duly convened meeting on May 12, 1989, at which a quorum was present, by a vote of 18 in favor, 0 opposed, 0 abstaining, and 1 absent.

Stanton O Katchatag
Stanton O. Katchatag, Chairman

Attest: Edgar Jackson
Secretary Edgar Jackson

EXHIBIT 1

## PROPOSED MARK-UPS FOR S. 611

1. The following proposed mark-ups are what we think are the minimum requirements tomake the proposed legislation workable in Alaska. This will require the following:

A A change in the definition of "Indian" to include "Descendants of a Native" as defined in Section 3 (r) of ANCSA.

B The addition of second exception to describe tribes which are already acknowledged by reorganization under the IRA by adding a new subsection (C) to section 7 (a) (2) of the proposed legislation and deleting subsection 7 (d) (1) (C) (V).

C The addition of a third exception as subsection (D) to Section 7 (a) (2) of the proposed legislation to require the Secretary to list all Alaska Native tribes which were improperly omitted from the Secretary's 1986 publication of Alaska Native tribal entities.

D Delete the final subordinate clause of section 11 (b) (5) referring to "Alaska Natives [operating] under the authority of a council."

II These mark-ups are described below with new language underlined.

A. Amend section 3 (1) of the proposed legislation to read as follows:

1) the Term "Indian" means any individual (including any Alaska Native or Descendant of a Native (within the meaning of section 3 of the ANCSA (43 U.S.C. 1602))....

B. Add the following new subsections to section 7 (a) (2) of the proposed legislation as follows:

2) The provisions of this Act shall not apply to --

* * * *

(C) an indigenous nation, tribe, band, village, clan, community, association or Indian group heretofore or hereafter acknowledged to be an indian tribe through the adoption of a constitution ratified and approved by the Secretary, under the Act of June 18, 1934, as amended (25 U.S.C. 451 et seq.) an indigenous nation, tribe, band, village, clan, community, association or Indian group heretofore or hereafter acknowledged to be an indian tribe through the adoption of a constitution, ratified and approved by the Secretary, under the Act of June 18, 1934, as amended (25 U.S.C. 451 et seq.)

(D) the following Alaska Native communities which are hereby acknowledged to be Indian tribes:

Afognak, Andreafsky, Ayukulik, Bells Flat, Bill Moore's, Chaloonawick, Council, English Bay, Georgetown, Hamilton, Kaguvak, Kaltag, Koliganek, Litnik, Mary's Igloo, Napaimute, Ninilchik, Nuiqsut, Ohagamuit, Paimute, Pauloff Harbor, Pelican, Port Williams, Salamatof, Seldovia, Skagway, Solomon, Tenakee, Tok, Unalaska, Ujanik, Umkumiute, Unga, Uyak, Woody Island, Yakutat, Shoognaq (Kodiak).

C. Amend Section 7 (d) (1) (C) by deleting subsection (v) and renumbering the remaining subsections (vi) and (vii) as (v) and (vi) respectively in order to eliminate the implied distinction between "historical" and "non-historical" tribes when applied to IRA's.

D. Delete the final subordinate clause of section 11 (b) (5) referring to "Alaska Natives [operating] under the authority of a council".

ORBIS Associates

# FINAL REPORT

# EVALUATION OF STATUS CLARIFICATION PROJECTS FUNDED BY ANA FY 1981 - FY 1988

CONTRACT DELIVERABLE NO. 9

CONTRACT NO. 105-87-6000

Submitted January 15, 1989

Submitted to:

Administration for Native Americans
Office of Human Development Services
Department of Health and Human Services
Washington, D.C.

1411 K Street, N.W., Suite 200 • Washington, D.C. 20005 • 202/628-

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# I. INTRODUCTION

This report is the culmination of an evaluation conducted by ORBIS Associates, under contract number 105-87-6000 with the Administration for Native Americans (ANA).

The purpose of this project was to examine the progress and project outcomes of 35 American Indian communities which received ANA status clarification grants between FY 1981 and FY 1988. One focus of the evaluation was to examine the major routes available for status clarification in terms of the processes (project objectives and activities) involved and the problems encountered by grantees while pursuing these routes. These routes included Federal legislative restoration and recognition; State recognition; recognition through the Federal Acknowledgement Project (FAP); judicial recognition; and designation as an Indian Reorganization Act (IRA) "half-blood" community. Another focus of the evaluation was to describe the benefits, both financial and otherwise, that the 35 grantees received as an outgrowth of their status clarification activities.

This project was designed with two levels of investigative inquiry. First, a review was conducted of the 35 communities' activities and reported accomplishments as direct outcomes of receiving ANA status clarification funding. This review resulted in descriptive profiles (Appendix A) of each grantee's progress. Secondly, site visits were made to nine groups resulting in case studies (Appendix B) representing in-depth examination of issues specific to each case. This report is a summary of the project's data analysis results and the findings of the study as they relate to issues identified in the evaluation schema of the contract. The report also includes recommendations to ANA.

## A. OVERVIEW OF FEDERAL AND STATE RECOGNITION OF TRIBES

Although anthropologists, government officials and attorneys specializing in Indian law, have yet to reach agreement on the precise definition of an "Indian tribe," in large measure, eligibility for Federal Indian services depends on membership in a recognized "tribe." Members of unrecognized tribes are ineligible for most kinds of special Indian services and programs; moreover, their communities enjoy none of the prerogatives of sovereignty.

Indian groups that are already *recognized* are tribes by virtue of their established political relationship with the United States. No ethnological test of tribal existence is required in such cases. Unrecognized Indians, however, are inevitably placed in the position of "proving" the tribal status of their communities.

In the 1930's, Felix Cohen generated criteria for tribal recognition which combined administrative and ethnological considerations, emphasizing legal requirements for a government-to-government relationship. At that time, anthropologists were hired by the Bureau of Indian Affairs (BIA) to make assessments based on field visits. More than twenty tribes gained recognition during the 1930's. Subsequent termination policies, however, quelled official interest in tribal recognition, which was not then rekindled until the early 1970's. By then the BIA was being pressured to reestablish administrative recognition procedures, and in 1976 the American Indian Policy Review Commission urged Congress to address the problem. In 1978 the BIA published formal regulations pertaining to Federal acknowledgement (25 CFR 83, originally 25 CFR 54). In the Executive Branch of the government, the U.S. Department of the Interior (DOI) is the only Federal agency empowered to *acknowledge* a tribe as eligible for the special services provided by the U.S. government to Indian groups. Congress has the authority to legislatively *recognize* a tribe or *restore* Federal recognition of tribal status to terminated tribes.

Since the late 1970's, there has been a great deal of activity generated in communities seeking Federal recognition as Indian tribes. Perhaps the easiest task rested with those groups who had once been recognized but had been terminated during the 1950's and 1960's. Seeking restoration appears to have been a far easier and speedier process for many of those groups than seeking initial recognition has been for others.

In the 1980's, several States also became particularly active in providing State recognition to resident Indian groups. For example, in 1984, as a result of extensive organizing and lobbying on the part of the Indian community, the Alabama State legislature passed a law establishing a formal Indian Affairs Commission while it simultaneously recognized six Indian groups within the State. Since that time, the State Indian Commission has recognized one other group in accordance with its authorization to provide such recognition under Alabama Law No. 84-257. Four of these seven Alabama State recognized groups have also sought Federal recognition through BIA's Federal Acknowledgement Project (FAP), one of whom has already been successful (namely the Poarch Band of Creek Indians). The North Carolina Indian Commission has recognized one Indian tribe in the past seven years. The State of Virginia passed a resolution in 1983 recognizing six tribes and another resolution in 1985 recognizing one other. Several other States, Michigan for example, have issued various forms of recognition to groups for the express purpose of defining eligibility for Indian tuition waivers for attendance at Michigan State universities and colleges.

There are essentially five strategies which an unrecognized group might pursue for clarification of its status as an Indian tribe. These are discussed below.

### 1. Federal Acknowledgement Petitions

The method most frequently used by Indian tribes for status clarification is the Federal Acknowledgement Petition (FAP) process of the Bureau of Indian Affairs. For many groups, however, the FAP process poses challenges that may be insurmountable. Although seemingly broad, the criteria are very strictly interpreted and require extensive documentation, some of which may simply not exist. Expenses associated with conducting the research and preparing a petition can be enormous and well beyond the reach of impoverished communities. Additionally, it often takes several years to compile the evidence needed for a petition. Gaps in funding and departures of key local personnel slow the process and reduce the likelihood of completion. Even if all of these problems are overcome, the subsequent review process itself can take years to complete.

Published in 1978, the Federal Acknowledgement regulations established criteria concerning descendance and sociopolitical organization for guiding administrative determination of whether a group is, in fact, an Indian tribe. The regulations require that groups seeking recognition submit a petition detailing the evidence that supports their eligibility under each of seven criteria. The seven criteria, all of which must be met in order to gain acknowledgement as an Indian tribe, are as follows:

> *(a)* *Establish that they have been identified from historical times to the present on a substantially continuous basis as American Indian or aboriginal;*
>
> *(b)* *establish that a substantial portion of the group inhabits a specific area or lives in a community viewed as American Indian, distinct from other populations in the area and that its members are descendants of an Indian tribe which historically inhabited a specific area;*
>
> *(c)* *furnish a statement of facts which establishes that the group has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present;*
>
> *(d)* *furnish a copy of the group's present governing document . . . describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members;*
>
> *(e)* *furnish a list of all known current members . . . based on the group's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary of the Interior, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity;*
>
> *(f)* *establish that the membership of the group is composed principally of persons who are not members of any other North American Indian tribe;*

(g) *[demonstrate] that the group or its members are not the subject of congressional legislation which has expressly terminated or forbidden the Federal Relationship.*

In 1979, the BIA prepared a set of guidelines explaining each of the criteria and outlining suggestions for research and data preparation. These guidelines provided the initial assistance for collection, presentation and assessment of evidence needed in an acknowledgement petition.

After a documented petition has been received by the Bureau of Indian Affairs, it is reviewed by a special branch of the BIA (the Branch of Acknowledgment and Research, BAR). The petitioner is then notified of any "obvious deficiencies or significant omissions" (usually referred to as an OD letter) and afforded the opportunity to either withdraw the petition or correct the deficiencies. No time frame is specified for the petitioners response. Once the response is received by the BAR staff, the petitioner must wait for an opening in the process to be placed under "active consideration." Once this has occurred, BAR has one year to complete its review (with an additional 180-day extension allowed if necessary) and issue a "proposed finding." Once the "proposed finding" is issued, the petitioner and all other interested parties have 120 days to respond to the finding after which a final determination is issued by the DOI. When the findings are affirmative, the petitioner formally enters into a government-to-government relationship.

Since its creation in 1978, the BAR staff has maintained a list of petitioning groups. As necessary, this list has been regularly revised and updated. Currently the list contains the names of 114 petitioners. (It should be noted that 27 of these 114 groups had requested DOI Acknowledgement prior to 1978 and the creation of the FAP office. Some of these requests go back as far as the 1920's. These requests were ultimately referred to BAR and added to the list of FAP petitioners.) Since 1978 the BAR staff has fully reviewed 19 petitions. Seven groups have obtained recognition, and 12 groups have been denied recognition. Two others have had proposed findings published--one negative, one positive. Cases for five other groups originally on the FAP petition list have been resolved outside the FAP process through legislation, thus leaving 88 petitions in various stages of the FAP process.

Case reports for both positive and negative outcomes offer valuable information for researchers working on petitions and others interested in this issue. The reports are extremely detailed and generally reflect a high level of scholarship. BAR has also prepared reports on other unrecognized groups which have altered their status through legislation, such as the Houlton Band of Maliseets, Cow Creek Band of Umpqua Indians, and the Texas Band of Traditional Kickapoos.

### 2. Federal Legislation

Recognition through the Federal legislative route is an alternative to FAP. Generally, it is not as technically demanding and it can usually be effected much more quickly. The outcomes of both FAP and legislation are, however, identical, i.e., extending the "privileges and immunities available to other recognized tribes by virtue of their status . . . ." Since the implications are equally serious, there are, of course, pressures to avoid granting legislative recognition frivolously. As with the FAP process, successful recognition legislation generally requires that there be strong evidence of tribal continuity. Increasingly, the FAP standards form the basis for legislatively determining if a tribe should be recognized.

Seeking recognition or restoration through the legislative process is generally perceived by petitioners as having the distinct advantage of a shorter period of review than FAP. Additionally, some advantage is seen in the possibility of Congressional discretion regarding technical deficiencies such as gaps in research documentation. However, mobilizing political support is an essential ingredient for successful legislation and not all groups possess the capabilities to accomplish that. Since 1980, at least six tribes have successfully obtained Federal recognition or restoration in connection with claims settlements through the legislative route.

### 3. Half-Blood Community

Another means of status clarification is the "half-blood" provision in the Indian Reorganization Act (IRA). A community whose members are all half-bloods or greater can become Federally recognized on the basis of blood quantum alone. It should be noted, however, that this provision has rarely been used and there are no formal BIA procedures established for reviewing "half-blood" requests. Since 1980, except for the Aroostook Band of Micmacs, no groups have submitted a formal request to the BIA to be designated a "half-blood" community under provision of the Indian Reorganization Act. While the Jamul Tribe in Southern California did obtain its formal designation as a half-blood community in 1981, the activities and documentation associated with obtaining this designation had all occurred several years before. Moreover, the experiences of the 21 Lumbee Indians who were declared to be half-bloods during the 1930's, but were then unable to obtain any substantial benefits, may suggest that this is not an efficient status clarification route to follow.

### 4. Judicial Action

The one remaining approach to gaining Federal recognition as a tribe is via the judicial route. This is probably the approach which is the most complex and which involves the greatest risk for a community. To date, all judicial actions which have had bearing on clarification of tribal status have arisen in conjunction with other suits/claims, e.g. land claims. Only one community in the study sample has had a judicial ruling on its status as a tribe. The negative outcome of this judicial ruling has had resounding repercussions with respect to interaction with the non-Indian community with whom the tribe shares a town.

### 5. State Recognition

State recognition is an alternative means of status clarification. This may be an appropriate route for groups unable to meet the requirements of FAP or to receive Federal legislative recognition; it may also be an appropriate alternative for those groups who choose not to have a Federal relationship. State recognition is usually obtained through an act of the State legislature or through Executive order. In either case, political support is essential. Not all States grant recognition, however, and the conditions vary considerably among those that do. For the most part, however, State recognition contributes to the community's social and economic development in ways that are less tangible than Federal recognition. For instance, State recognition may confer to a group the right to hold a position on the State Indian Commission, thereby playing a role in heightening non-Indian awareness of the State's Indian population and its needs.

## B. ANA STATUS CLARIFICATION PROGRAM

Since the late 1970's ANA's basic program thrust for all of its constituency (whether recognized, unrecognized, rural or urban) has been to foster balanced and integrated social and economic development strategies (SEDS) at the community level. Funding has been directed at communities whose grant applications specify clear and measurable objectives directed toward one or more of the following goals:

(1) to develop or strengthen tribal governments, local decision-making and Native American leadership;

(2) to encourage the development of stable, diversified local economies and economic activities which provide jobs, promote economic well-being and reduce dependency on welfare services; and

(3) to support local control and/or access to and coordination of programs and services which safeguard the health and well being of people and which are essential to a thriving and self-sufficient community.

Consistent with this SEDS philosophy, in the late 1970's ANA began to focus on the creation of a status clarification strategy which would reach both non-recognized and terminated tribes. Meetings were held with interested Indian organizations, numerous Federal agencies and, in particular, with staff of the U.S. Department of the Interior's Federal Acknowledgement Project (FAP), now the Branch of Acknowledgement and Research (BAR).

In February of 1981, ANA officially announced its status clarification strategy through two program announcements published in the Federal Register. One announcement solicited "mini-grant" applications for status clarification activities, which resulted in the funding of twelve projects for a two year project period at $10,000-$12,000 per annum. The purpose of the funding was to support community applied research directed at status clarification outcomes. The second announcement was for a Resource Mobilization Project designed to assist groups who were seeking to clarify their status. The project's goal was to link unrecognized tribes with researchers, academic professionals, lawyers and other technical assistance providers to facilitate information exchange, analysis of data, and to raise other non-ANA funding for conducting the necessary research. In addition to these two program announcements, at that time ANA also encouraged appropriate other grantees to direct some of their existing ANA resources into status clarification efforts.

In May of the following year, ANA published another status clarification program announcement. The goal of this announcement was once again to provide financial assistance for community applied research directed at status clarification outcomes. This time the project period was to be for seventeen months and the grant awards were, on the average, twice as large as in the preceding years.

Although both "mini-grant" program announcements stated that the recipient community was not required to choose a FAP strategy, clearly the long-range goal was expected to be Federal recognition via some means or, at a minimum, State recognition.

This assumption is compatible with the following statements in ANA's 1982 Issue Paper on Status Clarification:

> *"From the perspective of ANA's mandate, [the policies of] non-recognition and termination stand as barriers to Indian social and economic self-sufficiency. Both policies undermine the ability of Indian leadership to represent their constituencies before non-Indian entities. Both inhibit the exercise of lawful rights. Both fragment tribal cohesiveness. And, felt as affronts to tribal heritage, both produce attitudinal barriers to community development."*

In other words, ANA's Status Clarification Program was intended to assist groups to obtain some type of formal recognition. We stress this point here, because several ANA staff implied to us that formal recognition (either Federal or State) did not, in fact, have to be a community's intention when obtaining ANA status clarification funds. We believe this interpretation inconsistent with documented policy and program announcements and have proceeded with our study on the assumption that the statements in the above referenced Issue Paper remain true with respect to ANA's posture.

Although 1982 represented the last year in which ANA published a specific Status Clarification Program Announcement, the agency has since 1981 permitted its regular SEDS grants to be used for the same purpose viewing status clarification as (1) an essential ingredient to any future true self-determination efforts of an unrecognized Indian community, and (2) a precursor to being able to effectively govern or develop social and economic infrastructures necessary for a community's self-sufficiency. In other words, status clarification went hand in hand with ANA's overall SEDS initiatives. Since 1981, ANA has, in fact, funded over 118 grants which have been in part or exclusively directed toward status clarification initiatives at the local level. These 118 grants have provided money to at least 35 unrecognized communities, located in 15 states. Unfortunately neither ANA Program Information and Evaluation System (PIES) data nor ANA grant records enabled ORBIS Associates to determine the total funding amount which these grants represent. Listed on the next page are 35 of the communities that have benefitted from ANA status clarification funding and which are the study sample for this evaluation report.

## ANA Status Clarification
## Grantees In Study Sample

1. Abenaki Tribal Council, also known as Abenaki Self Help Association, Inc. (VT)
2. American Indian Council of Mariposa County, also known as Yosemite Tribe (CA)
3. Aroostook Band of Micmacs (ME)
4. Brothertown Indian Tribe of Wisconsin, also known as Brotherton Nation, Inc. (WI)
5. Central Valley Wintu, Inc. (CA)
6. Chinook Indian Tribe (WA)
7. Clifton Choctaw Indians (LA)
8. Coastal Band of Chumash Indians (CA)
9. Coharie Intra-Tribal Council (NC)
10. Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (OR)
11. Confederated Tribes of Grand Ronde (OR)
12. Cow Creek Band of Umpqua Indians (OR)
13. Duwamish Indian Tribe (WA)
14. Florida Tribe of Eastern Creeks, Inc. (FL)
15. Haliwa Saponi Indian Tribe, Inc. (NC)
16. Jena Band of Choctaw Indians (LA)
17. Juaneno Band of Mission Indians (CA)
18. Little Shell Tribe of Chippewa Indians of Montana (MT)
19. Lumbee Regional Development Association, Inc. (NC)
20. Mashpee Wampanoag Tribal Council, Inc. (ME)
21. Miami Nation of Indians of the State of Indiana, Inc. (IN)
22. Mowa Band of Choctaw Indians (AL)
23. Nor-El-Muk Band of Wintu Indians, also known as Hayfork Band of Norelmuk Wintu Indians (CA)
24. Northern Cherokee Tribe of Missouri and Arkansas (IN)
25. Poarch Band of Creek Indians (AL)
26. Pokagon Band of Potawatomi Indians, also known as Potawatomi Indian Nation, Inc. (MI)
27. Samish Tribe of Indians (WA)
28. San Juan Southern Paiute (AZ)
29. San Luis Rey Band of Mission Indians (CA)
30. Snoqualmie Indian Tribe (WA)
31. Steilacoom Tribe (WA)
32. Tuscarora Tribe of North Carolina, Inc. (NC)
33. United Houma Nation, Inc. (LA)
34. Waccamaw Siouan Development Association, Inc. (NC)
35. Wampanoag Tribal Council of Gay Head, Inc. (MA)

## II. METHODOLOGY

The study sample of 35 Indian groups was determined through consideration of several factors. To begin with, we noted that although the RFC Scope of Work statement referred to 48 grantees, the actual number of grantees listed in Appendix A of the RFC was 46. Through a review of project files in the ANA offices, we discovered that eight of the listed grantees were duplicates, i.e., one grantee community under different names or the same grantee listed under two States. Specifically, these were:

- Creek Nation East of the Mississippi, Inc.
  Poarch Band of Creeks
- Pokagon Band of Potawatomi
  Potawatomi Indian Nation, Inc.
- Brotherton Nation, Inc. (Michigan)
  Brotherton Indian Nation (Wisconsin)
- Confederated Tribes of Grand Ronde (California)
  Confederated Tribes of Grand Ronde (Oregon).

Thus, the initial study group list was reduced from 46 to 42. Of those 42, one listed grantee (Schaghticoke Indian Tribe) was found to have terminated its FY 1982 grant. Another grantee (Narragansett Tribal Education Project, Inc.) was eliminated from the study sample by technical direction from ANA. Four other grantees had no files available for review (Nelechundum, Shasta, New Hampshire Indian Council, and Pee Dee.) Thus, the study sample decreased to 36 Indian groups.

Again, through the review of file materials and/or PIES data, we determined that five of the remaining 36 grantees did not use their ANA funding for status clarification activities as defined by the study team. The definition of status clarification as used by the team was taken from the ANA Program Announcement (No. 13612-815) for status clarification minigrants to Indian groups *"for community applied research to clarify their* *status as Indians and as tribes within their States and/or with the Federal government."* Brief profiles of these five grantees are in Appendix C. The sample group was, therefore, further reduced to 31.

Thus, included in our study sample there were a total of 31 grantees from the original RFC list. In an effort to offset some of this difference in numbers, through the file review and discussions with ANA staff, we located four grantees who had used ANA money for status clarification purposes, and although not included on ANA's RFC list, were therefore, added as part of the study sample. These four grantees were:

- San Luis Rey Band of Mission Indians (California)
- United Houma Nation (Louisiana)
- The Wampanoag Tribal Council of Gay Head (Massachusetts)
- Abenaki Self-Help Association, Inc. (Vermont).

This project's evaluation methodology required data collection from a number of sources. As noted above, the first source of data which the study team reviewed was ANA grant files. To the extent files were available, grant documents were reviewed for the communities/groups that appeared on the RFC list. Files were expected to contain grant applications (including general demographic data for each community), grant award documents, evaluation reports, correspondence regarding grant implementation and, to the extent appropriate, ANA staff notes regarding grant monitoring. The completeness as well as comprehensiveness of grantee files varied considerably from one grant year to the next as well as from one grantee to the next. The lack of consistent information presented certain impediments to this study with respect to comparability of data across grantees. It was hoped that, to some extent, the gaps in information found in the files, could be supplemented through direct contact with grantees, the Bureau of Indian Affairs BAR staff, and, for the nine case study communities, through collection of on-site information. This ANA file search was also supplemented by review of ANA PIES data and other documents provided by staff.

After completing the ANA file search and review of other ANA information, ORBIS prepared the framework for a composite profile of each grantee. The profiles were intended to yield a descriptive and statistical context against which data could be meaningfully reviewed. The profiles include an overall description of each community, a history of its status clarification effort and the use to which it put its ANA funding (e.g., objectives by grant year) with respect to supporting status clarification activities.

The second step in data collection involved contacting the ANA study group grantees directly via telephone. This step in fact overlapped in time with the latter part of the file review process. While initially our intention was to speak with appropriate personnel at each of the 35 sites, this strategy was changed. After contacting approximately 37 percent of the grantees, we found that for the most part we were either collecting data which we were already ascertaining through the file reviews, or we were being given information which was difficult to verify and which was often in direct conflict with ANA files or PIES information. Perhaps more importantly, more than half of the communities we contacted were unable to furnish us with any information at all as to how ANA grant funds had been used or what the short- or long term impact had been of ANA supported activities. This was largely due to substantial change in board members or staff, the absence of whom left gaps in the institutional memory. It was determined that it was not cost effective to complete the telephone contacts as the supplemental information we were gathering was negligible at best.

In November 1987, the Evaluation Schema (Deliverable No. 1) was submitted to ANA. The schema delineated specific issues and considerations as they related to specific subsets of the study sample. These issues were based on information culled from the grant files, ANA and BAR documents, telephone contact with grantees, and consultants' knowledge about specific grantees. The evaluation schema served as a conceptual framework for organizing the issues to be addressed in the evaluation study. There were nine issues presented in the schema. These issues were:

- *Are the procedures and requirements involved in seeking legislative restoration versus those of seeking legislative recognition significantly different as to warrant case studies of successful examples of each route?*

- *In seeking status clarification, how does the fact of having a recent prior relationship with the Federal Government affect the route chosen?*

- *Is seeking status clarification through the IRA "half-blood" community designation and judicial recognition any more effective than pursuing status clarification through FAP or legislatively? What types of assistance are needed to pursue either the IRA or the judicial approach?*

- *What are the benefits derived from successful FAP acknowledgement and what benefits are derived from the process regardless of the outcome?*

- *What benefits are derived from State recognition itself and are there any groups that are satisfied with having achieved only this status?*

- *For those grantees in the various stages of the FAP process, what special activities have been funded by ANA, for how long, and are there specifically identifiable problems associated with a particular point in the process? What is the average length of time needed to accomplish activities related to FAP and are there specific problems encountered by individual grantees?*

- *Does the size of tribal membership cause any specific problems, what are they and how can they be resolved?*

- *Does the nature of the grantee's governance structure affect the status clarification process i.e., strengthen governance and community cohesion?*

- *What is the inter-relationship of the status clarification effort to any other SEDS goals of the grantee?*

These issues served both to focus the investigation and to guide the analysis of data which occurred later in the project. As such, the issues are addressed in the Analysis section of this report. In addition to the issues, the schema contained a set of evaluation questions around which the Site Visit Protocol was built, i.e., the questions would help to focus the investigation on-site and serve as a framework for writing the case study reports.

From December 1987 to February 1988, ORBIS also reviewed other sources of supplementary information in order to complete the grantee profiles and to collect additional socio-economic and demographic data on the 35 communities. Specifically, ORBIS met on four occasions with Bureau of Indian Affairs, Branch of Acknowledgement and Research (BAR) staff for the purpose of seeking additional information on individual community status clarification efforts and progress in researching for and writing FAP petitions. Several researchers working on individual FAP petitions were contacted as well as, in some cases, staff from Federal agencies other than ANA. Publications, articles and issue papers were collected and reviewed for supplemental information regarding status clarification efforts of tribes nationally as well as efforts occurring in specific communities.

Ultimately, there were profiles developed on 41 grantees that had received ANA funding, all ostensibly for status clarification. However, as noted earlier, some of these grantees had not conducted activities which fell under the study definition of status clarification. Thus, they were eventually removed from the study sample group. A descriptive analysis and overview of these grantees, the 41 profiles, and a list of financial resources comprised ORBIS' Interim Evaluation Report which was submitted to ANA in March 1988. This formally concluded the first-tier investigation of the evaluation.

The list of financial resources, which was mentioned above, identified Federal assistance available to groups once they became either Federally or State recognized. Our intention in developing this listing was to assist the evaluation team to measure the effectiveness of newly recognized or clarified tribes in using recognition as leverage for seeking new resources for their communities. Moreover, the listing was used to examine, where possible, how the status clarification effort itself encourages leadership development and community mobilization in such areas as planning, needs assessment, and program and business development. Although not originally intended as a separate contract deliverable, at ANA's request this list was revised several times in order to be of use to ANA grantees as a document in and of itself, separate and apart from this contract.

In January 1988, ORBIS convened a meeting of the evaluation team. Two ANA staff, including the FPO, were also in attendance at this two day meeting. The purpose of the meeting was to (1) obtain ANA input into the review of the study findings to date (as reported in the Monthly Management Reports and through on-going meetings and telephone contact with the FPO), (2) share with the entire team the information thus far gathered on the grantees and to then develop the criteria for the purposive sample and (3) obtain the expert review and advice of the evaluation team consultants on the content of the on-site evaluation guidelines.

Based on the outcomes and discussions at this Evaluation Team meeting, in February ORBIS proposed to ANA nine communities for on-site review and individual case studies. The case study approach had been specified in the RFP and was considered desirable in that it would allow us to document individual client outcomes rather than only measuring standardized quantitative outcomes for all status clarification grantees. It was also felt that detailed case studies of purposive samples would generate strategic information concerning unusual failures and successes while at the same time allowing us to make generalizations across the program. Furthermore, we hoped to identify specific conditions and factors within each community which affected how the process proceeded regardless of the status clarification strategy selected. The case study approach would enable us to identify (1) tangible benefits of status clarification which could either be measured or, at a minimum, quantitatively documented, and (2) intangible benefits which would require more qualitative methodologies to effectively document or measure, even if inferentially.

The nine case study sites were selected according to specific criteria that related to population/membership size, regional differentiation, status clarification route/outcome, and stage in status clarification process. For instance, we chose to examine a community which had successfully pursued Federal acknowledgement through FAP, one which had been declined acknowledgement through FAP, one which sought acknowledgement or restoration through a legislative route, others that were in the process of pursuing FAP acknowledgement, and one which had sought acknowledgement judicially. Several of the case study communities also had State recognition. The selection of sites also took into consideration the number of years of ANA status clarification support. We attempted to select sites which represented diversity with respect to these factors in order to determine if and how specific factors affected research implementation and success in completion of documented petitions or in seeking legislation.

In conjunction with the selection of case study sites, the evaluation team developed a Site Visit Protocol. This document was comprised of two sections. The first section consisted of site visit procedures which specified guidelines for both arranging and conducting the site visits and included a listing of persons to interview and material to review once on-site. The second section consisted of specific questions which were organized around six issues to be addressed:

- changes in governance structure
- benefits accrued from status clarification activities
- changes in the community's relationship with non-Indian groups
- community cohesiveness
- changes in economic health of the community
- specific use of ANA status clarification funds

The site visits were begun in March 1988. With ANA approval, the evaluation team decided that it would be efficacious to send two people to each site due to the tremendous volume of potential material to review and people to interview. It was also felt that the presence of two evaluation team members would mitigate the chances of gleaning conflicting information, since the interviews could be designed so as to cross-reference information collected by the other interviewer on the previous day. Except for

Abenaki and Mashpee, four days were spent at each site, including evening meetings with specific individuals for focus groups. At Abenaki and Mashpee, the evaluation team spent only two days on-site since the community leaders agreed only to that amount of time. All nine sites had been visited by the end of May, with draft case study reports for each site prepared and submitted to ANA and BAR staff for review and comment by July 1988. In addition, the draft case studies were forwarded to each community for comment, with recommended changes made accordingly, prior to the finalization of the case study reports. Revised case study reports were forwarded to ANA in October.

Analysis of all collected data began in late July. Data analysis included:

- a content analysis of the grantee profile data, PIES data (updated PIES print-outs were requested and partial reports on those grantees with FY 1988 funding were received) and case studies;
- a descriptive analysis of the thirty-five grantees in order to document ANA's status clarification clientele and to identify potential variables/patterns related to the status clarification process;
- a comparative analysis of the grantees, particularly those that have been successful in completing documented petitions, to identify possible factors that may facilitate successful completion of research tasks.

Data were updated throughout the analysis process to ensure the most current results. Particularly with the sample size in the study, it was important to do so since one or two grantees would affect the analysis significantly. The analysis results were then translated into a statement of issues and findings and related to specific recommendations.

## III. DATA ANALYSIS AND FINDINGS

There were thirty-five Indian groups included in the study sample for this evaluation. The thirty-five groups represented communities who received ANA funding between FY 1981 and FY 1988 for the express purpose of seeking clarification of status as Indian tribes.

### A. ANALYSIS OF TOTAL STUDY SAMPLE GRANTEES

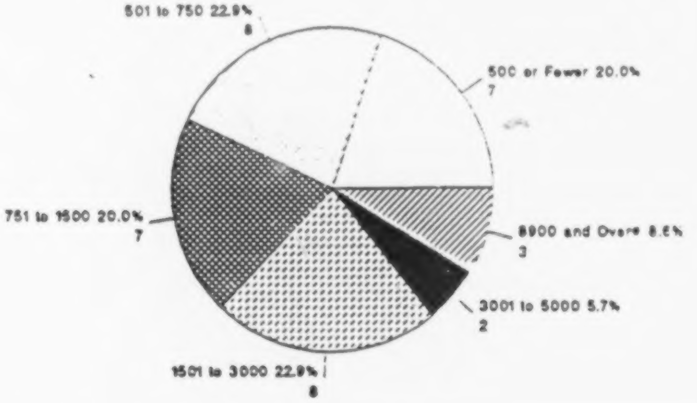
**Geographic Distribution and Membership Size.** The study sample covered status clarification grantees in fifteen States. The State with the largest number of grantees was California with six communities assisted by ANA. In view of the fact that almost 20 percent of the 114 Federal Acknowledgement petitioners are located in California, this ANA focus in California seemed particularly appropriate. The States of North Carolina and Washington each had five communities which have received ANA status clarification assistance (which also corresponds to States with the second and third largest number of Federal Acknowledgement petitioners). Alabama, Oregon and Louisiana each had three ANA status clarification grantees, Massachusetts two, and eight other States each had one grantee.

| Region | Number of ANA Status Clarification Grantees in Study |
|---|---|
| Northeast | 4 |
| Southeast | 11 |
| Northwest | 8 |
| Southwest | 7 |
| North Central | 5 |

As evidenced on the preceding page, ANA has done a commendable job with respect to providing status clarification assistance over a widely-dispersed geographic and regional area. Moreover, the distribution of funding has been generally consistent with the dispersal of FAP petitioners.

Regarding the size of communities represented by the 35 grantees, their membership ranged from as few as 150 to over 30,000 with Jena and Lumbee representing the respective extremes. Fifteen grantees (or about 43 percent of the projects) had fewer than 750 members. Another seven grantees (or 20 percent) had between 751 and 1,500 members. In other words, approximately 63 percent of the communities included in this study sample fell below the BIA's "small tribe" definition of 1,500 members. Of the remaining 13 grantees, ten ranged between 1,501 and 5,000 members and three (or 8.6 percent) had memberships which exceeded 5,000 (Lumbee with 30,000, Tuscarora with 11,200 and Houma with 10,200).

Chart 1: Grantees by Membership Size

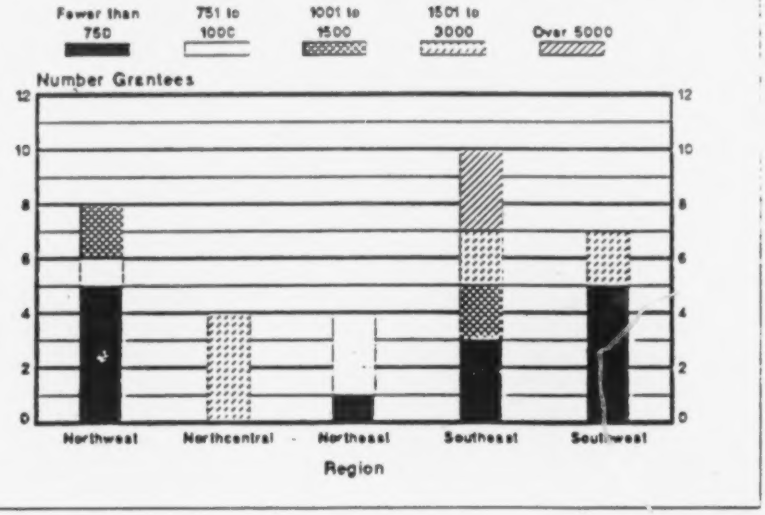


*Note: Largest tribe has over 30,000 members

When the population size of the 35 communities was examined by geographic region, a number of noteworthy differences appeared.

| | |
|---|---|
| Northwest: | all eight groups were relatively small, six having fewer than 1,000 members, and two having about 1,200 members. |
| Northcentral: | all five groups were relatively large, ranging from 1,700 to 3,500 members. |
| Northeast: | all four groups were small, ranging from 500 to 1,000 members. |
| Southeast: | six groups had fewer than 1,500 members (three of them had fewer than 750); two groups had between 2,000 - 5,000 members; additionally, the only three groups in the total study sample who had more than 5,000 members were located in this area. |
| Southwest: | five groups had fewer than 750 members (four had fewer than 500); two groups had from 1,500 to 3,000 members. |

Chart 2: Group Membership Size by Region



In summary, the northwest and northeast groups tended to be small, generally having fewer than 1000 members; the southeast and southwest groups represented a wide spectrum with respect to population figures; and the northcentral (i.e., Northern Plains and Midwest) groups had population sizes that generally fell within a medium to large range. Similar patterns, with respect to membership size and geographic area, emerged when we examined BAR's list of groups who, as of July 1, 1988, had reached at least the "active consideration" state of the FAP process. We can conclude, therefore, that ANA's funding has reached groups which are fairly representative, and that ANA's funding patterns have been a good reflection of the communities nationwide who are seeking clarification of their status as Indian tribes.

**Numbers of Grants and Duration of Funding.** During the period of time covering Fiscal Years 1981 through 1988, ANA made 118 awards for status clarification purposes to the 35 communities included in our study sample. This number includes "sub-grants" to communities through either the Small Tribes of Western Washington (STOWW) or the Native American Rights Fund (NARF). It should be noted that about 30 percent of the 118 grant awards were exclusively status clarification awards, while the remaining 70 percent of the awards included other SEDS activities in addition to the status clarification objectives. The number of grants each of the 35 communities received ranged from one to seven as shown in the list below. In summary, 71 percent of the communities in the study sample received at least three years of ANA status clarification support. Forty percent received four or more years of support.

It is important to note here that, for many reasons, we were unable to identify how much money was spent by ANA on its FY 1981 - 1988 Status Clarification Program. We were, in fact, even unable to estimate a plausible range of funding commitments. Research for this included the absence of project files, incomplete PIES data, and lack of information at the local level. Perhaps more importantly, most ANA records do not definitively distinguish funding spent on status clarification versus other SEDS activities supported under one grant award. Nor do grantees report these funding distinctions in their final reports.

## ANA Grantees By Years of Status Clarification Funding

Grantees Receiving One Grant Award *(4)*

- *Central Valley Wintus, Inc. (CA)*
- *Clifton Choctaw Indians (LA)*
- *Mashpee Wampanoag Tribe (MA)*
- *Nor-El-Muk Band of Wintu (CA)*

Grantees Receiving Two Grant Awards *(6)*

- *American Indian Council of Mariposa County (CA)*
- *Coastal Band of Chumash Indians (CA)*
- *Confederated Tribes of Grand Ronde (OR)*
- *Juaneno Band of Mission Indians (CA)*
- *Poarch Band of Creek Indians (AL)*
- *San Luis Rey Band of Mission Indians (CA)*

Grantees Receiving Three Grant Awards *(11)*

- *Brothertown Indians of Wisconsin (WI)*
- *Chinook Indian Tribe (WA)*
- *Coharie Intra-Tribal Council, Inc. (NC)*
- *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (OR)*
- *Cow Creek Band of Umpqua Indians (OR)*
- *Jena Bank of Choctaw Indians (LA)*
- *Little Shell Tribe of Chippewa Indians of Montana (MT)*
- *Mowa Band of Choctaw Indians (AL)*
- *Potawatomi Indian Nation, Inc. (MI)*
- *Steilacoom Tribe (WA)*
- *Tuscarora Tribe of North Carolina (NC)*

Grantees Receiving Four Grant Awards *(7)*

- *Duwamish Indian Tribe (WA)*
- *Florida Tribe of Eastern Creeks (FL)*
- *Lumbee Regional Development Association (NC)*
- *Northern Cherokee Tribe of Indiana and Arkansas (IN)*
- *Snoqualmie Indian Tribe (WA)*
- *United Houma Nation, Inc. (LA)*
- *Waccamaw Siouan Development Association (NC)*

*Grantees Receiving Five Grant Awards (3)*

*Miami Indian Nation, Inc. (IN)*
*Samish Tribe of Indians (WA)*
*San Juan Southern Paiute (AZ)*

*Grantees Receiving Six Grant Awards (2)*

*Abenaki Self-Help Association (VT)*
*Aroostook Band of Micmacs (ME)*

*Grantees Receiving Seven Grant Awards (2)*

*Haliwa-Saponi Tribe (NC)*
*Wampanoag Tribal Council of Gay Head, Inc. (MA)*

Furthermore, 23 (66 percent) of the 35 study sample communities were recipients of grants under one of ANA's two mini-grant program announcements. Of these original ANA mini-grant recipients, 79 percent received ANA status clarification support for at least two years after conclusion of their mini-grant projects. Thirty-five percent received three or more years of ANA support after conclusion of their mini-grant awards. It is clear that status clarification projects require on-going assistance, irrespective of the strategy chosen for pursuit of recognition. Seeking recognition is a lengthy process and cannot be accomplished in a twelve month grant cycle, except perhaps in the rare case when a community has already completed the majority of background work prior to receipt of its initial ANA funding. Even the Poarch Band of Creeks, which was fortunate in having had an interested researcher who did research on the tribe for several years independent of the Poarch petition effort, still took two years to submit a petition and to do the follow-up documentation. This is a key point to note since review of the annual project objectives funded by ANA frequently do not reflect a realistic knowledge of the time factors involved in seeking recognition.

Of the 23 recipients of mini-grants included in our case study, two of the communities have now been legislatively recognized or restored, two have been Federally recognized through the FAP process, and 12 have submitted documented petitions or are at some other stage even further along in the FAP review. In other words, only seven of the mini-grant recipients (30 percent) have not at least submitted a documented petition to BAR. On the other hand, of the 12 study group communities who did not receive funding under ANA's original mini-grant program announcement, six (or 50 percent) have not yet submitted documented petitions. From these data, we can conclude that ANA has lent considerable support to advancing the progress of status clarification initiatives. The more continuous the ANA support, the further along the study sample communities are likely to be in the status clarification process. Moreover, the earlier they obtained ANA support, the further along they are likely to be in the process.

**Status Clarification Routes Pursued.** One focus of the study was to examine the different routes for status clarification in terms of how many grantees chose specific routes and why. We found that, unless a tribe had been terminated, it was overwhelmingly likely to be pursuing the FAP route and had used ANA funds in support of this endeavor.

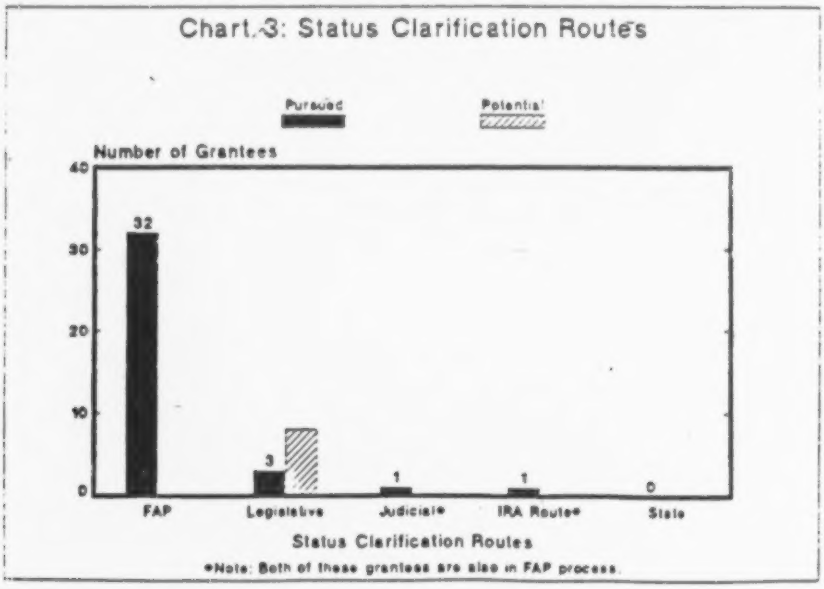


Chart 3: Status Clarification Routes

*Note: Both of these grantees are also in FAP process.

- FAP route - - Of the 35 Indian communities in the study sample, over 90 percent, or all but three, were or presently are seeking clarification through procedures and criteria established under the Department of Interior (DOI) Federal Acknowledgement Project (FAP).

- The three groups not pursuing the FAP route were ineligible to do so in that they had been terminated by Federal legislation and thus could not meet criterion (g) of the FAP criteria. These three groups are the Cow Creek Band of Umpqua Indians; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; and the Confederated Tribes of Grand Ronde. All three tribes are located in Oregon and all three during the past six years have gained clarification of their status through legislation. [Note: Several groups who are pursuing the FAP route are simultaneously attempting to have recognition legislation enacted.]

- Judicial route - - Of the thirty-five groups in the study sample, not one Indian community chose this route for the purpose of clarifying its status as an Indian tribe. However, as a result of a land claims suit, the Mashpee Wampanoag Tribe was subjected to a judicial ruling of its status as an Indian Tribe. The judicial finding was that the Mashpee Wampanoag' were no longer a tribe. Regardless of this finding, the tribe is eligible to pursue the FAP route, and thus it is now involved in completing a documented petition for submission to BAR.

- IRA Half-Blood Community route - - There was only one grantee, the Aroostook Band of Micmacs, which was pursuing this route. However, it was doing so in addition to working on a FAP petition and legislation. In February 1987, the Aroostook Micmacs submitted two petitions to the Secretary of DOI for recognition under the IRA provision. One petition sought individual recognition of 157 Micmac individuals as *persons of one-half Indian blood*; the other petition sought recognition of the Aroostook Micmac Band as a *half-blood Indian community* based upon a "remarkably high" percentage of tribal members who are half-blood Indians. It is our understanding that DOI has not taken action on either of these petitions since Aroostook is also pursuing the FAP process. It should be noted that DOI has no formal procedures for recognizing tribes under this route, which has been used infrequently. Also, this route may not be the most effective for gaining full rights as a Federally recognized tribe. An attorney working with several California tribes on their FAP petitions cited in recent Congressional testimony that the Mono Lake Indian community, a group of about 100 individuals which was recognized in 1979 under the IRA half-blood provisions, is now "seeking full recognition as an Indian Tribe [through FAP]."

- State recognition - - None of the 35 study sample communities identified State recognition as a viable or important status clarification objective to be supported with ANA money. This is an important point to be noted by ANA, as it is indicative of the communities' perception of a diminished value in having State recognition.

**Use of Status Clarification Funds for Research.** ANA funds have supported four different, although related, research activities of tribes seeking Federal recognition or acknowledgement. These are historical, genealogical, ethnographic, and legal research. Usually these activities were carried out simultaneously by one or two researchers, yet each activity involved different research skills and methods.

Regardless of the status clarification route pursued, these types of research are critical to establishing a claim for recognition. The types of evidence needed to establish a judicial claim, e.g., a land claim, entails the establishment of not only the legal claim, but also that the group taking the judicial action is, in fact, still a tribe and entitled to make the claim. Recognition or restoration legislation, also involves all four types of research to build a compelling case. Finally, the FAP process and criteria also require these same forms of evidence. Since the overwhelming majority of the study sample grantees were using the FAP process, the following discussion will focus on how these four types of research relate to specific FAP criteria.

The need for detailed historical research is evident from even a cursory review of the FAP regulations. FAP criterion (a) calls for the tribe to show that it has been identified as "American Indian" from historical times, meaning from generation to generation. Under FAP criterion (c) the petitioner must show continuous political authority or influence over its members, virtually from the time of initial European contact. Since the groups in question seldom have documented histories available, the researcher is forced to spend considerable time searching State and local archives, private collections, and obscure secondary sources for information. Complicating the research problems is a general attitude throughout the nineteenth and much of the twentieth centuries that resulted in lumping a group's members with other non-whites, thus obscuring their Indian heritage. In order to make clear the complex nature of a group's history and to explain the absence of documentation and the distortions that exist in the few records available, researchers must provide a historical narrative. This narrative must document the main events that sustain a group's assertion that it has maintained a tribal existence to be acknowledged. The historical research component is long, tedious, and expensive.

FAP criteria (a) and (d) require the members of a group to demonstrate that they are Indians descended from a known Indian tribe. This is normally accomplished by tracing the ancestry of the members back to a list of known members. Given the problems of lost and destroyed records, mis-identification of individuals, and the failure of individuals to register births and marriages, this can become a time-consuming task. The requirement that the members show descent from a known tribe adds immeasurably to the research problems and cost.

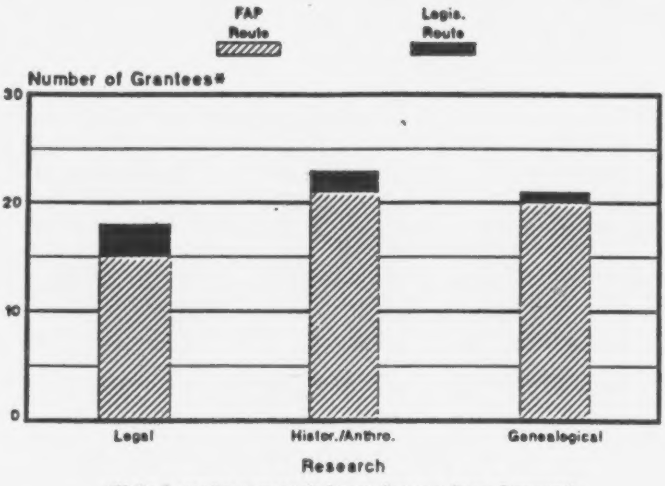
The third area where ANA funding has been significant is the research needed to address FAP criterion (b) - - the community. This work involves doing a contemporary community study analyzing such things as the social relations among the members of the community, their beliefs and folklore, residency patterns, and decision-making processes. It requires an anthropologist trained in community collecting and analyzing data. In addition to collecting contemporary data on the community, researchers must collect information on the political system of the group over time, as well as oral traditions and histories, since there seldom are good descriptions available in the published sources. Moreover, there has been a tendency on the part of BAR to demand more and more detail on the community, thus increasing the time required in the field and the cost of the research.

It is not necessary for the individuals who collect the historical documentation to write the petition, but it is necessary that they demonstrate that a thorough search of the sources has been conducted. The researchers must be required to provide copies of all research as well as information on all of the sources they have reviewed. The field workers doing the contemporary community studies should write up their work and should provide enough information so that someone else can check their findings. They should provide copies of all tape recordings. Field notes can present problems in that individuals often will only speak if assured anonymity and thus, knowing that the research materials will be turned over to the tribe may inhibit free expression. The petitioner should work out these details with the researchers prior to the commencement of the research, and final payment should be contingent on the submission of all required reports and all necessary data.

Finally, there are legal questions to be answered. Does the group have a claim to land, water, or mineral rights? Has it been previously recognized? Has it been subject to Congressional termination? The historical researchers should be aware of these possibilities and, if evidence is found on any of them, the group should seek competent legal advice.

For the 24 grantees who have submitted documented petitions or have completed the legislative strategy, Chart 4 below indicates, by category, the types of research (genealogical, anthropological/historical, and legal) conducted with ANA funds. Because they are so intertwined, we have combined the historical and anthropological research categories on the chart.

Chart 4: Research Conducted by Grantees



*Note: A grantee may conduct more than one type of research.

**Non-Research Uses of Status Clarification Funds.** In addition to the use of funds to conduct research related to status clarification, 17 (49 percent) of the 35 study sample communities used ANA funds for objectives specifically related to tribal reorganization or strengthening of governance structure in anticipation of recognition. ANA funds were used for (a) development or revision of Tribal Constitutions and/or By-laws which would reflect recognition status or (b) leadership training of Tribal Council or Board members directly related to changes in Council function and tribal status once recognition was obtained. For purposes of this evaluation study, these activities have been included as status clarification in nature.

These seventeen communities involved in such governance strengthening activities were:

- Abenaki
- Brothertown Indians
- Central Valley Wintu
- Cow Creek Umpquas
- Grande Ronde
- Haliwa-Saponi
- Jena Choctaws
- Little Shell Chippewa
- Miami
- Northern Cherokees
- Poarch Creeks
- Potawatomi
- San Juan Paiute
- San Luis Rey Mission Indians
- Steilacoom
- Tuscarora
- Waccamaw-Siouans

We conclude that use of ANA status clarification funds for this purpose is not only a commendable pursuit of those 17 communities who have undertaken it, but is a pursuit which should be more encouraged by ANA. Surely, the strengthening or restructuring of governmental structures in order to accommodate a new status as a tribe, should be the first major step once a group has obtained recognition. A strong government with sound and effective operational procedures in place should be the springboard for advancing a community to greater social and economic self-sufficiency. From the case study evidence, it is readily apparent that those tribes that have developed strong administrative capabilities are better serving their community membership while also pursuing status clarification. Furthermore, tribes with developed management capabilities and experience can clearly make a smoother transition once Federal recognition is achieved.

## B. ANALYSIS OF GRANTEES PURSUING THE LEGISLATIVE ROUTE

There were three ANA grantees out of the 35 in the sample group that have thus far been successful in pursuing a legislative route for status clarification; namely the Cow Creek Band of Umpquas, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, and the Confederated Tribes of Grand Ronde.

These tribes represent groups with special long-term efforts to seek land claim settlements. Virtually all of these tribes were included in several bills introduced five successive times by U.S. Senator Charles McNary between 1924 and 1932. These bills tried to obtain Court of Claims jurisdiction for land claims on behalf of certain bands and tribes of Oregon Indians who either had never been paid for their lands or had received inadequate compensation. These early legislative efforts to establish claims were passed by Congress in 1932, but then vetoed by President Hoover.

In 1954, the Western Oregon Indian Termination Act (25 U.S.C. 690) terminated Federal supervision and trust over several tribes in Oregon. Among the tribes mentioned in subchapter 692 were the following: Coos, Cow Creek, Lower Umpqua, Siuslaw and Upper Umpqua and the Confederated Tribes of the Grand Ronde Community. The Grand Ronde Restoration Act restored Federal recognition to that tribe in 1983. Similarly, the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians were legislatively restored their Federal recognition in 1984. The Cow Creek Band of Umpqua Tribe of Indians Recognition Act extended Federal recognition to that tribe in 1982.

[It should be noted that the Cow Creek Band of Umpquas presents a complex case as documented in our case study (see Appendix B). Despite Federal recognition in 1982, the on-going sequence of disagreements between the tribe and BAR have to a considerable extent slowed the tribe's progress with respect to social and economic development. This was obviously not an anticipated outcome of the 1982 recognition.]

The ANA supported status clarification efforts of these three Oregon groups were substantially different from those of grantees pursuing the FAP route. Table 1 below shows the tribes' legislative efforts in relation to their ANA funding. (Note: Both Cow Creek and Coos later received other ANA status clarification support for activities associated with their recognition. These grant awards are, however, excluded from Table 1].

**Table 1: ANA Funding to Support Legislative Recognition**

| Grantee | ANA Funding | Amount of Funding | Legislation Enacted |
|---|---|---|---|
| Cow Creek Band of Umpquas | FY 1981* | $12,000 (x 2 yrs.) | December 1982 |
| Confederated Tribes of Grande Ronde | FY 1983 SEDS<br>FY 1984 SEDS | $60,000 **<br>$77,000 ** | November 1983 |
| Confederated Tribes of Coos, *et al* | FY 1982 ***<br>FY 1985 SEDS | $15,319<br>$16,000 | October 1984 |

* FY 1981 status clarification mini-grant and continuation grant the following year; Program Announcement 13612-815

** Funding amount represents total SEDS grant award amount, not only money for the status clarification objectives as that amount could not be determined in our research.

*** FY 1982 status clarification mini-grant for 17 months

As shown above, all three tribes used two years of funding to devote toward work on obtaining legislative restoration or recognition. The types of status clarification activities carried out by each group are somewhat similar. Specifically these were:

Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians

- preparation and submission of witness testimony on legislation
- obtaining legal advice regarding hunting/fishing rights, land claims, and status of trust lands
- assistance for attending legislative hearings

Confederated Tribes of Grande Ronde

- revising, preparing and adopting Constitution/By laws
- updating tribal rolls; computerizing tribal rolls and demographic data on membership
- reviewing and approving contents of proposed reservation legislation

Cow Creek Band of Umpquas

- searching and collecting ethonographic, linguistic, historical and archeological materials on tribe
- developing legal history of tribe
- establishing tribal archives
- gaining support for legislation from State, Federally recognized tribes, and civic organizations and churches
- writing a tribal constitution
- pursuing tribal land claims

Based on the file review, it was determined that two of the groups, Cow Creek and Coos, both used the same researcher, Dr. Steven Beckman, an ethnohistorian, and the same legal attorney, Dennis Whittlesey, in their status clarification efforts. We could not locate comparable information for Grand Ronde.

When examining only the ANA funding history, the relatively short time devoted to the status clarification efforts of these three tribes (compared to FAP efforts of other groups) is somewhat misleading in view of their long-term efforts which preceded either the creation of the FAP process or ANA's Status Clarification Program. Moreover, the fact that two of these tribes were terminated in 1954 would make it plausible to assume that some membership, historical, and archival records would have been maintained over this approximately 25 to 30 year period of time. In the case of Cow Creek, perhaps there were more resources devoted to such research, but that cannot be confirmed in comparison to the other tribes, since files were either not available or materials limited.

There are at least eight other tribes in the study group which are currently either contemplating using the legislative route to gain Federal recognition or have actually had legislation introduced. These groups are the Lumbee Regional Development Association; the Aroostook Band of Micmacs; the Brothertown Indians of Wisconsin; the Mowa Band of Choctaws; Duwamish; Chinook; Snoqualmie; and, Steilacoom. All eight of these communities are also FAP petitioners and have undertaken considerable work with respect to their FAP petitions. In fact, with the exception of Brothertown and Micmac, the groups have reached at least the documented petition stage of the FAP process. Despite their FAP activities, however, these groups are simultaneously thinking about a legislative strategy to pursue recognition. In the case of Duwamish, Chinook, Snoqualmie and Steilacoom (all small tribes in Washington), BAR's denial of acknowledgement for the Samish Tribe (another Washington tribe) has raised considerable concern about the outcome of their own petitions particularly since many of the issues faced by these four tribes are similar to those raised in the Samish review. In the case of the Brothertown Indians, research has indicated that the tribe may, in fact, be a terminated tribe and thus ineligible for the FAP process. Lumbee and the Aroostook Micmacs are both eager to make certain that all bases are covered to ensure a positive outcome with respect to their Federal recognition. A legislative strategy may ultimately appear more propitious for these groups. We note, however, that since shortly after the FAP regulations were instituted, Congress has been indicating a preference for allowing the FAP process and criteria to make the determination, where appropriate, of whether a tribe should or should not be Federally recognized. This attitude did not, however, preclude the recent introduction of legislation for recognizing the Lumbees.

## C. ANALYSIS OF GRANTEES PURSUING THE FAP ROUTE

Thirty-two of the 35 study sample groups chose to pursue status clarification through the FAP route. As of November 1988, 21 of these communities (66 percent of the total) had actually submitted documented petitions to BAR. Two of these (Poarch and Gay Head) have already completed the FAP process and have gained acknowledgement; one (Samish) has completed the FAP process and was denied acknowledgement; and one (San Juan Southern Paiute) has received a proposed positive finding and is currently waiting for final approval. It is noteworthy that literally two-thirds of the ANA study sample pursuing the FAP status clarification route have actually completed and submitted documented petitions to BAR. Only 11 grantees in the study sample have not yet progressed that far in the process.

For ease of the reader, let us reiterate here the various stages of the FAP process. The first thing a petitioner must do is to file a letter petition which is basically a notice of intent to submit a documented petition which will address the seven FAP criteria. This letter petition stage is important in that it establishes the priority order in which groups are reviewed once documented petitions have been submitted to BAR. The next FAP stage is entered into when the group submits the actual "documented" petition. Once BAR has received the documented petition the petitioner is notified of any obvious problems with the petition through "a letter of obvious deficiencies or significant omissions." This letter is usually referred to as an OD letter. At this point, the petitioner is given the opportunity to withdraw the petition or correct the deficiencies. The petitioner has whatever time it requires to respond to the OD letter. Once BAR receives the response, the petition awaits an opening in the recognition process in order to go on active consideration status. Once active consideration is begun, BAR has one year (plus a possible extension of 180 days) to complete its review and to issue a preliminary finding. The petitioner, as well as any other interested party, is then given 120 days to respond to the preliminary finding, after which BAR makes its final determination. It should be noted that in practice these time constraints are somewhat flexible.

Listed on the following page are the thirty-two study sample ANA grantees who have completed or are still involved in the FAP process. The listing is broken down into the various stages identified by BAR and reflects information as of November 1988.

### ANA Grantees By Stage of Petition Effort

Letter Petition only (11):

- *Aroostook Band of Micmacs (ME)*
- *Brothertown Indian Tribe of Wisconsin (WI)**
- *Central Valley Wintu, Inc. (CA)*
- *Coastal Band of Chumash Indians (NC)*
- *Coharie Intra-Tribal Council (NC)*
- *Florida Tribe of Eastern Creeks (FL)*
- *Mashpee Wampanoag Tribal Council, Inc. (MA)*
- *Northern Cherokee Tribe of Missouri and Arkansas (MO)*
- *San Luis Rey Band of Mission Indians (CA)*
- *Waccamaw Siouan Development Association, Inc. (NC)*
- *Tuscarora Tribe of North Carolina, Inc. (NC)*

Documented Petition Submitted (8):

- *Clifton Choctaw Indians (LA)*
- *Duwamish Indian Tribe (WA)*
- *Haliwa Saponi Indian Tribe, Inc. (NC)*
- *Juaneno Band of Mission Indians (CA)*
- *Lumbee Regional Development Association, Inc. (NC)*
- *Mowa Band of Choctaw Indians (AL)*
- *Nor-El-Muk Band of Wintu Indians (CA)*
- *Potawatomi Indian Nation, Inc. (MI)*

Received Notice(s) of Obvious Deficiencies (3):

- *American Indian Council of Mariposa County (CA)*
- *Steilacoom Tribe (WA)*
- *Chinook Indian Tribe (WA)*

Responded to Notice of Obvious Deficiencies (2):

- *Little Shell Tribe of Chippewa Indians of Montana (MT)*
- *United Houma Nation, Inc. (LA)*

---

*The Brothertown Indians have completed a petition but have not submitted it to BAR.

Awaiting Active Consideration/OD Response Complete (3):

*Abenaki Tribal Council (VT)*
*Jena Band of Choctaw Indians (LA)*
*Snoqualmie Indian Tribe (WA)*

Under Active Consideration (2):

*Miami Nation of Indians of the State of Indiana, Inc. (IN)*
*San Juan Southern Paiute (AZ)*

Acknowledged through FAP (2):

*Poarch Band of Creek Indians (AL)*
*Wampanoag Tribe of Gay Head (MA)*

Denied Acknowledgement through FAP (1):

*Samish Indian Tribe (WA)*

### 1. ANA Grantees At The Letter Petition Stage

Eleven of the study sample petitioners have not yet submitted documented petitions to BAR. However, through data collected while conducting our case studies and through contacts with BAR staff, researchers, and some community leaders, we were able to ascertain information about the stage of petition development for most of these communities.

In the case of the Brothertown Indian Tribe of Wisconsin, a documented petition has, in fact, been completed, but has not been submitted to BAR pending a legal determination. Specifically, based on new evidence it appears that the Brothertown Indians may have been terminated thereby making them ineligible to submit under the FAP criteria. For this reason, they may withdraw their petition and pursue recognition through legislation. Concerning the Mashpee Wampanoag Tribe, the petition is close to completion and their researcher anticipates submission of a documented petition early in 1989.

Taking into consideration that the Brothertown Indians' petition is completed and that the Mashpee petition will be ready shortly, we conclude that 72 percent of the 32 ANA grantees involved in FAP can show substantial progress in the petition process. ANA can definitely be credited for this progress. While ANA funding has not always been the sole support for petition research and data collection efforts, in most cases ANA money has served as the primary financial resource for the work done to date. Almost without exception, the communities have credited ANA as the mainstay of their status clarification initiatives.

For communities less far along in completing their petitions, we were able to obtain the following information. The Coharie Intra-Tribal Council has two sections of its petition completed, and is now working on its genealogical evidence and community study. The Aroostook Band of Micmacs has its petition complete except for the community study portion. The Waccamaw-Siouan Development Association is still conducting genealogical work, and the descriptions of the contemporary community and the analysis of leadership sections still need to be written. The researchers working on the petition for the Florida Tribe of Eastern Creeks have indicated that there is still more field work to be done; however, they anticipate that a petition may be ready within a year. Regarding the petition of the San Luis Rey Band of Mission Indians, the attorney who assisted the tribe has indicated that there was still much work that needed to be completed, particularly anthropological research. Apparently no research has been done since the group's FY 1987 ANA grant ended. Similarly, the work on the petition of the Coastal Band of Chumash Indians appears to have stopped with the conclusion of ANA funding. We understand there is internal dissension between the group's board of directors and community members over whether the group should continue its status clarification work.

## 2. ANA Grantees That Have Submitted Documented Petitions

**Relative Time Frames Required.** Our evaluation study period was originally Fiscal Years 1981 through 1985, with an extension of that period then added to include the Fiscal Years of 1986-88. Two ANA grantees had, in fact, already submitted their documented petitions prior to the commencement of our study period time. The Samish Tribe submitted a documented FAP petition in October 1979, and the Poarch Band of Creek Indians submitted a documented petition in January 1980. (These two tribes used their subsequent ANA status clarification grants to respond to deficiencies and omissions noted by BAR in the materials submitted.) By the end of FY 1981, one other grantee had submitted a documented petition - - the Chinook Indian Tribe which submitted in August 1981. Thus, at the beginning of the evaluation study time frame, only three of the study sample groups had actually submitted documented petitions. By the end of 1985, however, eight more ANA supported grantees had submitted documented petitions to BAR. Furthermore, an additional ten groups had submitted documented petitions to BAR as of November 1988.

In summary, since FY 1981, 21 groups receiving ANA status clarification funding have completed and submitted documented petitions (two having done so prior to the study's time frame). It can easily be concluded that ANA has played the pivotal role in moving grantees along in the FAP process. Moreover, ANA has clearly helped sustain grantees' status clarification efforts after documented petitions have been submitted and additional research and documentation have been required in response to BAR's OD letters. Twenty-one grantees have used ANA funding to support research efforts for the initial submission of the documented petition.

Table 2 on the next page shows the stages in the FAP process reached thus far by the 21 ANA grantees who have already submitted documented petitions.

## Table 2: Chronology of Grantees Submitting Documented Petitions

Response for OD submitted
Not yet reviewed by BAR

Response to OD received
Awaiting Active Status

| | Petition Submitted | OD Letter Issued | Responded to OD | Second OD Issued | Responded To Second OD | Final Finding |
|---|---|---|---|---|---|---|
| Samish | 10/79 | 01/80 | 05/80 | [on active consideration 10/80] | [additional data submitted 03/81] | Denied 05/87 |
| Poarch | 01/80 | 06/80 | 02/81 | 08/83 | 09/83 | Acknowledged 08/84 |
| Chinook | 08/81 | 03/82 | 07/83<br>07/87 | 11 /88 | | |
| Abenaki | 10/82 | 06/83 | 08/86 | [documentation complete - - awaiting Active Consideration] | | |
| Gay Head | 08/83 | 06/83* | | | | Acknowledged 04/87 |
| Mariposa | 03/84 | 05/85 | 07/87 | 04/88 | | |
| Miami | 06/84 | 01/85 | 01/86 | [in active consideration] | | |
| San Juan | 06/84 | 09/84 | 03/85 | [in active consideration - - proposed Acknowledgement 08/87] | | |
| Little Shell | 10/84 | 04/85 | 11/87 | | | |
| Jena | 05/85 | 09/86 | 11/86 | [documentation complete - - awaiting Active Consideration] | | |
| Houma | 07/85 | 12/86 | | 05/87 | 03/88 | |
| Snoqualmie | 1976**<br>06/86 | 02/87<br>08/87 | | [documentation complete - - awaiting Active Consideration] | | |
| Steilacoom | 10/86 | 11/87 | | | | |
| Duwamish | 11/87 | | | | | |
| Lumbee | 12/87 | | | | | |
| Clifton | 12/87 | | | | | |
| Juaneno | 02/88 | | | | | |
| Mowa | 04/88 | | | | | |
| Haliwa | 04/88 | | | | | |
| Nor-El-Muk | 09/88 | | | | | |
| Potawatomi | 11/88 | | | | | |

* Given verbal notice of OD in 1983 prior to land suit which delayed petition process

** Withdrew original petition submitted in 1976, resubmitted in 1986

Based on the experiences of the ANA status clarification grantees as illustrated in Table 2, we can make certain generalizations about the FAP process. This information should be useful both to ANA staff and other Indian groups who are considering choosing this status clarification route. These issues relate to stages within the FAP process and it is hoped will give some indication as to the complexity of the process.

Please note: the time frames regarding the petitions of the Gay Head Wampanoags and the Snoqualmie Tribe are somewhat atypical. Gay Head was verbally notified by BAR late in 1983 about omissions and deficiencies in their petition; however, BAR suspended its review of Gay Head's petition in 1984 while a land claim settlement was in process. A formal written deficiency notice was not sent to Gay Head until mid-1985 when its petition was once again reactivated. In the case of Snoqualmie which originally submitted a documented petition in 1976, the tribe withdrew its original petition from review when BAR gave indication late in 1982 of a proposed negative finding on the Samish petition. (Snoqualmie is one of five small tribes in Washington State, including Samish, which face somewhat comparable issues and circumstances. Thus, Snoqualmie had a special interest in the outcome of the Samish petition.) Snoqualmie then resubmitted a petition in June 1986. Since both Gay Head and Snoqualmie represent special cases, they are not included in the discussion below as data relating to them would misleadingly skew the analysis.

For the 11 grantees for whom we have reliable and accurate data, Table 3 on the next page represents the lapsed time for a tribe between submission of its documented petition and receipt of BAR's OD letter. While the lapsed time, according to FAP regulations, is supposed to be 60 days, this time period actually averaged nine months, and ranged from three to 17 months.

**Table 3: Lapsed Time Between Submission of Documented Petition and Receipt of OD Letter (cross reference Table 1)**

| | |
|---|---|
| Samish | 3 mos. |
| Poarch | 5 mos. |
| Chinook | 7 mos. |
| Abenaki | 8 mos. |
| Mariposa | 14 mos. |
| San Juan | 3 mos. |
| Miami | 7 mos. |
| Little Shell | 6 mos. |
| Jena | 14 mos. |
| Houma | 17 mos. |
| Steilacoom | 13 mos. |

The listing of grantees in Table 3 is in order of documented petition submission with the most recent at the end. It's readily apparent that the time period between submission of a documented petition and receipt of an OD letter from BAR is getting progressively longer. For the seven groups who have submitted documented petitions since Steilacoom submitted theirs in 1986, it's probably safe to assume that the waiting period may be even greater.

It is important to remember that documented petitions are initially reviewed and then progress through the other stages of the FAP process based on the order established by the original letter petition dates. Just because a group has submitted a documented petition does not mean that another group's petition, even if submitted after the first group's, will not be reviewed first. In other words, since other factors within the FAP process affect the sequence of review, submitting a documented petition does not necessarily mean that the petition will be immediately reviewed or reviewed next. Furthermore, it is important to recognize that the completion of a documented petition represents only a portion of the necessary research and documentation activities of the petition process. Considerable additional work may well be required in order to prepare adequate responses to BAR's OD letters.

As Table 4 below indicates, there is substantial difference in the speed with which individual grantees are able to respond to their OD letters. These differences can be attributed to a variety of factors, including (1) the amount as well as quality of resources a grantee may be able to access for preparation of its response, and (2) more importantly, the relative difficulty of research tasks called for in responding to the OD letter. Both these factors, and others which may come into play, can vary greatly from one community group to the next thus affecting the time frame involved in preparing a response to an OD letter. However, we can make some generalizations about the relative time and amount of support needed for response to OD letters.

In terms of responding with additional data to their respective OD letters, the eight grantees for which information was available, required an average (mean) response time of a little over 24 months:

Table 4: Lapsed Time Taken For OD Response(s)

| | |
|---|---|
| Samish | 12 mos. |
| Poarch | 39 mos. |
| Chinook | 17 mos. |
| Abenaki | 38 mos. |
| Mariposa | 33 mos. |
| Little Shell | 31 mos. |
| Houma | 22 mos. |
| Jena | 15 mos. |
| Miami | 12 mos. |

The figures in Table 4 reflect some of the different factors per petitioner as mentioned before. For example, in the case of Samish, the tribe submitted additional documentation even after its petition was placed on active consideration. Table 4's figures also include the time involved in responding to a second OD letter for those groups to whom one was issued. For instance, Mariposa responded to its first OD letter in 26 months; it then received a second OD letter nine months ago to which it has not yet responded. Thus, the figure for Mariposa in Table 4 is actually tentative; while it represents lapsed time for response to the first OD letter, the time involved for response to the second OD letter is not yet known. The figures for Chinook represent a similar case. In the case of Houma, on the other hand, the Table 4 figure includes the time involved for the tribe to respond to both OD letters; however, the tribe is still waiting for BAR review of the second response to determine if in fact it is satisfactory. If it is not, then the lapsed time for Houma may, in fact, become even longer. The same situation applies for the figures for Little Shell, whose OD response is still awaiting review for adequacy by BAR staff. In summary, the figures in Table 4 may ultimately be greater, thus increasing the response time beyond the 2 year average reflected by these tentative figures.

It is critical that ANA staff, potential applicants for ANA status clarification funding, and reviewers of applications for such funding thoroughly understand that the FAP review process generally takes a great deal of time. For the three study sample grantees who have thus far had positive (or proposed positive) findings, the mean lapsed time between actual submission of a documented petition and BAR's issuing of positive findings was over four years. That four years is just for the FAP review and finding process, and does not reflect the time involved before that for researching and developing the petition itself.

The Samish Tribe, which had a negative finding, had a lapsed time of over seven and a half years between submission of its petition and BAR's final negative finding. The Samish case was, however, somewhat unusual, and its time span may not, therefore, be reflective of the normal case. For this reason we did not include its time span in the mean lapsed time between submission of a documented petition and the issuing of findings.

**Table 5: Time From Submission of Documented Petition to Final Finding**

| | |
|---|---|
| Samish | 7 yrs. 7 mos. |
| Poarch | 4 yrs. 7 mos. |
| San Juan | 4 yrs. (to date) |
| Gay Head | 3 yrs. 8 mos. |

One can clearly understand that the FAP process is neither simple nor quick. In the mid-1970's when the FAP regulations were being drafted, BAR staff noted that they envisioned a fairly simple process that could be handled by a petitioning group with little or no additional expertise. However, experience over the past decade indicates that this clearly has not been the case.

The data discussed on the preceding pages clearly indicate that the time required to complete the petitioning process is steadily and dramatically increasing. Furthermore, the time involved in researching and preparing the petitions themselves has significantly grown. The earlier submissions were generally prepared through one or two ANA grants (along with accessing other resources), while most of the later petitions which have been submitted have involved much more time and money. Legal assistance groups as well as many professional anthropologists and historians who are conducting the research for petitioning groups have become increasingly concerned at what they view as growing amounts of evidence which BAR is requesting. Furthermore, they have expressed concern over both what they perceive to be inconsistent application of the FAP criteria and that there have not been substantial increases in the BAR staff to meet the growing number of petitions and, thus, demands on BAR staff time.

In response to these concerns, researchers are now spending more time reviewing the BAR findings and reports from completed FAP cases, in order to better gauge potential pitfalls or perceived shortcomings in their client's petition review process. Thus, the initial petition development process itself is now far more complex and involved, requiring more time as well as financial resources to support it. Added to this is the significant increase in time for the actual FAP review process once a petition is submitted and before the issuing of final findings. Concern over this point has been repeatedly addressed to Congress as well as DOI officials. In 1983, NARF reported to Congress that it anticipated a minimum of four years to lapse between submission of a petition to the actual delivery of services to a newly acknowledged tribe. In its May 1988 testimony to Congress, NARF revised this time frame to a minimum of eight years. In other words, in only five short years, the FAP review process is seen by NARF as having literally doubled. Given the fact that there are now even more documented petitions waiting for the process to commence, one can assume that the time frame will at best remain the same, if not continue to grow. Despite the long-term commitment required for successful support of acknowledgement research, the potential benefits are very great to those groups that do succeed. For those groups that can make it, it is a highly worthwhile investment.

The implications of all this for ANA are obvious. Current and potential status clarification grantees are likely to require many years of ANA support - - from the first steps associated with petition development through the actual issuing of findings. Ramifications with respect to ANA funding guidelines and application review are discussed on pages 75-78 in the Section entitled "Issues and Recommendations."

**ANA Funding to Grantees With Documented Petitions.** Table 6 below and on the next page identifies the ANA grants used by the 21 groups which have submitted documented petitions to BAR.

TABLE 6: ANA-SC FUNDING TO GRANTEES SUBMITTING DOCUMENTED PETITIONS[1]

| Grantee | Funding Prior to Submission | Submission of Doc. Petition | Subsequent ANA Funding | OD letter(s) Received By Tribe | Response(s) Submitted | Later ANA Funding | Final Finding |
|---|---|---|---|---|---|---|---|
| Samish | FY 1979* | 10/79 | FY1981[2]<br>(FY 1982) | 1/80<br>10/80 | 5/80<br>3/81 | FY 1984<br>FY 1985<br>FY 1986 | 5/87<br>Negative |
| Poarch | FY 1979 | 1/80 | FY 1982[3] | 6/80<br>8/83 | 2/81<br>9/83 | | 8/84<br>Positive |
| Chinook | | 8/81 | FY 1982 | 3/82<br>10/88 | 7/83 | FY 1985*<br>FY 1986* | |
| Abenaki | FY 1981<br>(FY 1982) | 10/82 | FY 1984<br>FY 1985 | 6/83 | 1/85<br>8/86 | FY 1987 | |
| Gay Head | FY 1981<br>(FY 1982) | 8/83 | FY 1984<br>FY 1984** | (verbally 1983)<br>6/85 | | FY 1985<br>FY 1986**<br>FY 1987** | 4/87<br>Positive |
| Mariposa | FY 1981<br>(FY 1982) | 3/84 | | 5/85<br>4/88 | 12/86 & 7/87 | | |
| San Juan Paiute | FY 1982 | 6/84 | FY 1984 | 9/84<br>6 & 9/85 | 2 & 3/85<br>1 & 4/86 | FY 1987** | 8/87<br>Proposed Positive |
| Miami | FY 1982 | 6/84 | FY 1984<br>FY 1985 | 1/85 | 1/86 | FY 1986<br>FY 1987 | |
| Little Shell | FY 1984[4] | 10/84 | FY 1985 | 4/85 | 11/87 | FY 1988 | |

* ANA assistance provided through a grant to STOWW
** ANA assistance provided through a grant to NARF

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[1] Grant years shown are only those for which there were SC objectives: other ANA grants for non-SC objectives are not shown

[2] FY 1981 Status Clarification minigrants were for two years according to ANA Status Clarification Issue Paper. Files were not found. FY 1982 continuation grants are shown in parentheses.

[3] FY 1982 new grants were for 17 months according to Issue Paper, these files were not found.

[4] An FY 1984 grant to Little Shell is referenced in the historical narrative of their FAP petition, but does not appear in PIES or files.

| Grantee | Funding Prior to Submission | Submission of Doc. Petition | Subsequent ANA Funding | OD letter(s) Received By Tribe | Response(s) Submitted | Later ANA Funding | Final Finding |
|---|---|---|---|---|---|---|---|
| Jena | FY 1984 | 5/85 | FY 1986<br>FY 1987 | 9/86<br>10/87 | 11/86<br>12/87 | | |
| Houma | FY 1984** | 7/85 | FY 1986 | 12/85<br>5/87 | late 1986<br>3/88 | FY 1987**<br>FY 1988 | |
| Snoqualmie | FY 1981<br>(FY 1982)<br>FY 1985*<br>FY 1986* | 1976<br>resubmitted<br>6/86 | | 2/81<br>late 1986 | 3/87 | | |
| Steilacoom | FY 1982<br>FY 1984*<br>FY 1985 | 10/86 | | 11/87 | | | |
| Duwamish | FY 1981<br>(FY 1982)<br>FY 1985<br>FY 1986<br>FY 1986* | 11/87 | | | | | |
| Lumbee | FY 1981<br>(FY 1982)<br>FY 1984<br>FY 1985 | 12/87 | | | | | |
| Clifton | FY 1986 | 12/87 | | | | | |
| Juaneno | FY 1981<br>(FY 1982) | 2/88 | | | | | |
| Mowa | FY 1982<br>FY 1984<br>FY 1985<br>FY 1981 | 4/88 | | | | | |
| Haliwa | FY 1981<br>(FY 1982)<br>FY 1984<br>FY 1985<br>FY 1986<br>FY 1987<br>FY 1988 | 4/88 | FY 1988 | | | | |
| Nor-El-Muk | FY 1986*** | 9/88 | | | | | |
| Potawatomi | FY 1982<br>FY 1984<br>FY 1986 | 11/88 | | | | | |

* ANA assistance provided through a grant to STOWW
** ANA assistance provided through a grant to NARF
*** ANA assistance provided through a grant to Nothern California Indian Development Council

Of the 13 grantees shown in Table 6 as having received an OD letter, all but two - - Mariposa and Steilacoom - - used ANA money in responding to BAR's OD requests for further information or clarification of data. In the case of Mariposa, although the tribe had used ANA FY 1981 and 1982 mini-grant funds to assist in preparation of its documented petition, the follow-up documentation required by the OD letter was largely put together by volunteers or through small sources of funding other than ANA. The tribe erroneously believed that it was not eligible for further ANA support after completion of its two-year mini-grant, and thus never sought further ANA status clarification funding. To date, the tribe has received two OD letters and is still in the process of responding to its second one. The Steilacoom Tribe, which had first received ANA funds for preparation of its documented petition in FY 1982, and again in FY 1984 and 1985 through STOWW, has not subsequently used any ANA funding to assist in preparing its response to its 1987 OD letter.

The remaining 11 of the 13 groups who have received OD letters have used at least one ANA grant for purposes of conducting additional research and documentation to supplement the original petition and/or response to BAR's OD letter.

- o Samish: After its petition had gone on active consideration status, the Samish Tribe used an FY 1981 ANA mini-grant and a portion of its three ANA SEDS grants (FY's 1984, 1985, 1986) to conduct additional research and to mobilize other status clarification resources. A majority of this ANA money was used between the time the tribe was notified of a proposed negative finding in November 1982 and the final negative determination issued by BAR in May 1987.

- o Poarch: Having already submitted a documented petition, the Poarch Band of Creeks received an ANA Status Clarification mini-grant in FY 1982 to support a 17-month project to collect documentation for deficiencies and omissions which were anticipated in the tribe's second OD letter (ultimately received in August 1983).

- Chinook, Houma and Snoqualmie: Each of these groups received two OD letters from BAR, and each used three years of ANA funding to research and prepare their responses.

- Abenaki: The tribe received its OD letter in June 1983 and has since then used portions of three ANA grants to prepare its response. OD responses were forwarded to BAR in January 1985 and August 1986.

- Gay Head: This tribe submitted its documented petition in August 1983 and received a partial OD response verbally at the end of that year. Pending settlement of the Gay Head Land Claim, BAR work on the petition was suspended. The written OD letter was then not received by the tribe until June 1985. Gay Head actually used portions of five ANA grants (including ANA support through NARF grants) to collect supportive documentation for the OD letter and to "monitor the FAP process."

- San Juan Paiute: This tribe used an FY 1983 ANA grant to complete, over 17 months, the anthropological (oral/written history and ethnography) and genealogical research for its documented petition submitted June 1984. Starting in FY 1984, portions of the three year ANA-funded project were used to build the tribe's administrative capacity, train tribal leaders and draft a tribal constitution as follow-up to the tribe's petition being placed on active consideration by BAR in November 1984. BAR issued a notice of proposed positive finding in August 1987, and hopes to make a final decision in February 1989.

- Miami and Little Shell: These groups used three and one ANA grants, respectively, for purposes of responding to BAR's OD letter. Miami's response was determined adequate and the group is currently under active consideration. Little Shell's OD response has not yet been reviewed to determine if more documentation is necessary.

ANA has provided substantial support for conducting additional research and collecting necessary documentation in response to BAR's Obvious Deficiencies letters. Eighty-five percent of the study sample communities who have received OD letters used ANA funding for the necessary follow-up work. In total, 22 percent of ANA's 118 status clarification grants awarded between FY 1981 and 1988 were directed at OD responses, while 65 percent were directed at research and preparation of the initial documented petition. The remaining 13 percent were directed at other types of status clarification activities such as development/revision of tribal constitutions and training of tribal officers.

For those eight groups which have submitted documented petitions but have not received OD letters, except for three cases, it is clear that the number of grants needed for funding has clearly grown. As shown in Table 6, five groups needed at least three ANA grants in order to submit a documented petition; of those, two used four ANA grants to get to that stage. When one considers that the number of grants needed for submitting a documented petition is apt to be at least three, and that there will then be more funding needed to respond to OD letters, ANA's commitment to assist tribes with status clarification is potentially quite substantial. Furthermore, for ensuring that funds already given to grantees are ultimately effective, ANA must consider sustaining grantees over a long-term, multi-year, multi-grant process. These points relate specifically to several of this study's recommendations on pages 75-78.

In summary, it is important to note here an assumption made in the RFC regarding the amount of time needed for status clarification, specifically:

> *"Five years of such activity provides an adequate time frame within which to appraise what has happened as a consequence of the support offered in this area and to determine the extent to which Federal recognition brings added leverage for self-sufficiency."*

In retrospect, ANA's assumption that a five-year time frame was adequate to assess both the outcomes of the status clarification process and the benefits of Federal recognition was overly optimistic. As already noted, the lapsed time from submission of a documented FAP petition to BAR's issuing of a finding has recently been averaging over four years. Moreover, this four year time period does not take into account the many prior years of research needed in order to complete a documented petition. Additionally, only a very small number of groups, either in the 35 study sample communities or even beyond ANA's grantee constituents, have yet achieved Federal recognition. Thus, data are sufficiently scarce so as to make correlation or comparative analysis virtually impossible. We note these facts here both to place the study's findings in perspective and to once again highlight the difficulties and complexities discussed above, inherent in the process of status clarification.

## D. ANALYSIS OF GRANTEES PURSUING THE JUDICIAL ROUTE

Only one of the ANA status clarification grantees was subject to a judicial resolution of its status as an Indian tribe. That grantee was the Mashpee Wampanoag Tribal Council, and the judicial finding was adverse. However, a judicial finding is not final, i.e., a group can still seek recognition through Congressional legislation or the FAP process. The only Federal prohibition against acknowledgement of a tribe is contained in the FAP regulations [83.7 (g)] which makes ineligible for FAP any tribes that have been terminated by an Act of Congress. Thus, a judicial finding, while it can acknowledge the existence of a government-to-government relationship, cannot prevent Congress or the U.S. Department of the Interior from reversing a negative finding.

This is not to argue that the judicial approach is without merit. The judicial process has arisen in conjunction with law suits over land alleged to have been taken illegally, in violation of the Indian Trade and Intercourse Acts (1790-1834). Among other things, these acts prohibited the sale of Indian lands to individuals under any conditions, and to States unless there was a U.S. Commissioner present and unless the subsequent agreement was ratified in the usual manner.

Besides the Mashpee Wampanoag case, there have been four other judicial suits involving recognition or acknowledgement as part of the controversy and settlement. However, unlike Mashpee these cases did not involve status clarification as the primary outcome of the judicial finding. In the Maine case, the Secretary of the Interior was sued in Federal court for refusal to honor his trust responsibilities to the Maine Indian Tribes. It was ruled that the tribe had a trust relationship with the United States, and that the Department of the Interior and the Justice Department had an obligation to protect the tribe's rights. In effect, the court acknowledged the existence of the government-to-government relationship. With that hurdle removed it was possible for the tribes and the state to negotiate a settlement on a more even playing ground.

In the case of the Narragansett Tribe's suit, the tribe and the State of Rhode Island worked out a settlement, which was approved by Congress. However, the legislation required that the tribe be acknowledged by BAR before the provisions of the act could be implemented. A negative finding by BAR would have voided the settlement. In this instance, acknowledgement followed settlement.

In the case of the Mashantucket Pequot Tribe of Connecticut, the settlement legislation provided for recognition of the tribe. Again, there was a lawsuit filed followed by settlement legislation to resolve it. This legislation, however, provided for the recognition of the tribe, after the most perfunctory review by BAR.

Finally, there is the case involving the Gay Head Wampanoag Tribal Council. Settlement negotiations were carried on for several years, during which the tribe prepared and submitted a petition for Federal acknowledgement to BAR. The petition was kept inactive by agreement of the parties until the terms of the settlement had been worked out. At that point it was acted upon by BAR as a precondition to settlement. Once BAR had made an affirmative finding, the settlement legislation was passed. The legislation also included language recognizing the tribe. Although this tribe was included in ORBIS' study sample, its case was not considered as an incidence of status clarification through the judicial route.

Another context in which tribes may use the judicial route is to force the Department of the Interior through litigation to provide services. However, no tribe has yet taken this option. Another method available is for a tribe to seek Congressional approval to have its case heard in court. At least one tribe in the study group considered seeking Congressional reference legislation. In 1987, Aroostook considered a judicial approach, i.e., a land claim suit was seen as being costly and potentially destructive of the support it had developed with the State and other Maine Indian Tribes.

Thus, while the judicial route has been successful in securing acknowledgement only in the Maine case, it has been used effectively with other alternatives to bring about the desired results in a number of other cases. With the anticipated backlog in the BAR process one can expect to see more litigation.

## E. ANALYSIS OF BENEFITS DERIVED BY GRANTEES IN CASE STUDY GROUP

In addition to the overall analysis of data from the 35 communities, the evaluation focused on an in-depth examination of nine of the 35 study sample communities. This examination culminated in nine case study reports which *"provide an in-depth analysis of representative tribes which will illuminate the immediate and subsequent financial advantages and substantial initiatives arising within groups which have secured ANA's financial assistance in seeking status clarification,"* as required in the RFC. The nine case study communities were selected on the basis of several criteria (see Methodology, page 17 - 18). The nine case study reports are included in Appendix B.

It is important here to discuss several assumptions inherent in our original evaluation plan. Our evaluation schema was designed to relate specific variables to derived benefits and successful progress (e.g., completion of a documented petition) within the status clarification process. These variables included membership size, years of funding, time within the FAP process, administrative capacity (i.e., strengthened governance), and geographic region. The strongest correlation was between (a) the amount of financial benefits derived and (b) the administrative capacity of the tribe. As noted elsewhere, regardless of how far along a group was within the FAP process, if it had a strong administrative capacity in place, it was more likely to access available resources. On the otherhand, a tribe, whether federally recognized or in the final stages of FAP, would not demonstrate many benefits unless it also had developed its administrative capacity (e.g., demographic and needs data collected, systematized management training given to tribal officers, personnel and fiscal systems implemented).

There was no correlation between the progress of the tribe in completing a documented petition and progress in its social and economic development. No conclusive findings were forthcoming, on how membership size affected petition development. No correlation could be made between years of funding and other variables. We can only note that those petitions documented and submitted early after the establishment of FAP seem to have been done with fewer years of funding and that the latest petitions submitted have used more years of ANA support.

Regarding region - specific variables, we note that the documentation and research tasks for grantees in the southeast are usually made more difficult by the events of the Civil War (i.e., state, county and municipal records were destroyed.) Likewise, the tending for Indian people to be lumped with other non-whites in records up until the 1950's has caused problems.

We would like to note also the assumption in the RFC, i.e., that the evaluation could focus on benefits "*which may be in the form of grants from a variety of Federal agencies whose authorizations limit financial assistance to* Federally recognized tribes." We note this RFC statement because in our proposal and evaluation schema we mention that only five groups (14 percent) of the total study ~~sample~~ of the 35 communities and only ~~two~~ of the case study groups have yet achieved Federal recognition. For this reason, the case study sample selection criteria were expanded to include additional factors and considerations beyond those specified in the RFC. The following discussion primarily focuses on findings that relate to benefits derived from the actual process itself of seeking status clarification.

### 1. Financial Benefits and Changes in Economic Health

We can begin by focusing on the financial benefits and changes in economic health achieved by these nine ANA grantees. Of the study group sample, no other tribe symbolizes the ultimate financial benefits of successful status clarification as well as the **Poarch Band of Creek Indians** in Alabama. For the three years prior to gaining Federal recognition in August 1984, the tribe's budget for administration and tribal programs averaged $400,000 per annum. In contrast, for the five fiscal years (FY 1984 - FY 1988) since Federal recognition, the tribe has averaged over $3.6 million per annum - - a 900% gain. For the post-recognition period, even in the year with the lowest tribal budget (FY

1985), the tribe's budget of $1,661,558 represented a tripling of the previous pre-recognition year's budget.

The Poarch Creeks now operate at least 35 programs of benefit to tribal members. Creek Nation Enterprises, Inc., the private enterprise arm of the tribe, operates a large motel and restaurant/gift shop complex which during the 1987 three month summer period alone served approximately 64,000 visitors. This restaurant complex is a true symbol of the well-planned and quality economic development efforts of the tribe.

The tribe's primary source of economic support has been the Creek Nation Bingo operation which has been in place for three years. During that period of time, not only has the Bingo operation been able to become self-sufficient but it has also generated profits some of which are used to fund various community projects. Thus, the profits are immediately tangible to tribal members.

At the time of the ORBIS study team's visit the Poarch Band of Creeks were also negotiating a joint venture with a clothing manufacturing company to establish a garment piece-work assembly plant on Poarch Creek property and to market the company's completed products. As noted in the case study, the tribe has taken impressive steps toward improvement of the tribal economy. First, it put programs in place and made an effort to hire qualified tribal employees while also offering training incentives so that tribal employees could move up. Second, tribal enterprises have been started which, while not necessarily providing immediate improvements for individual members, have provided fairly rapid and symbolic improvements for the tribe as a whole. Third, this tribe has been outstanding not only in its general coordination with the local non-Indian community but more importantly in its extensive cooperation in developing specific joint venture/joint opportunities with the non-Indian community. This factor alone has contributed significantly to the tremendous social and economic growth of the tribe.

All in all, the Poarch Creek case elucidates a number of exemplary practices and approaches which might be well suited for adaptation elsewhere. In addition to the points already discussed, several other explanations may, in part, account for the Poarch Creeks' success in providing such extensive benefits to its members. The tribe had worked on stabilizing its administrative structure (not just its governance structure) long before receipt of recognition. It wisely did this in anticipation of handling a later influx of both dollars and programs. The tribe also conducted comprehensive demographic surveys, thus solidly documenting community needs in order to plan appropriate programs.

In contrast, and as a lesson that Federal recognition does not automatically confer significant financial benefits upon a tribe or necessarily aid a community's efforts to seek economic self-sufficiency, we turn to the **Cow Creek Band of Umpqua Indians** in Oregon. This tribe provides an example of the complexities and difficulties potentially involved in the transition from unrecognized to Federally recognized status. Although having gained Federal recognition through legislation in 1982, the Cow Creek Umpquas have yet to exercise full rights as a Federally recognized tribe.

Since their recognition, the Cow Creek Umpquas have experienced serious problems which have impeded the social and economic growth of the community. Not only have these problems interfered with the receipt of certain Federal monies, but, in addition, they have diverted the time and focus of tribal leaders from pursuing activities which might otherwise have activated greater community growth. These problems have largely, but not exclusively, arisen from sharp disagreement with the BIA over issues of governance, membership, and who should be considered the legal representative for the tribe. Of particular import is that the tribe's reservation and economic development plan is tied to the $1.5 million dollars the tribe won in a land claims judgement. Although the BIA has placed most of this money in an account for the tribe, the distribution has been held up pending BIA and tribal agreement over a distribution plan (please refer to the case study for a more specific discussion.) According to tribal officials interviewed, a small but vocal group of tribal members has opposed the tribe's plan to place the total claim award in a trust fund with only part of the interest being paid directly to tribal members and the rest being be used for tribal operations and enterprises. This small minority of the tribe has urged that a full per capita payment be paid out.

Despite the above cited problems, since gaining Federal recognition the Cow Creek Umpquas have obtained some direct benefits. The "new tribes" funds from the BIA, for the three years up to 1986, ranged between $104,325 and $270,125. In FY 1987, the Cow Creek Umpquas were to have received $195,000 but the BIA withheld further payment after distribution of only about a quarter of that amount. The tribe has also received funding from the Indian Health Service (IHS) for a community health nursing program and clinic. They have received IHS support to improve their water supply and waste disposal system and to operate a drug and alcohol education program ($13,000). The tribe received $50,000 from the U.S. Department of Housing and Urban Development (HUD) for the purpose of purchasing trailers for a trailer park facility. This facility is located on land which was purchased by the Cow Creek Umpquas with a loan guaranteed by BIA. There is also a motel which came with the property and which at present is the only tribal enterprise. However, even that venture has been affected by the disagreements with BIA, in that there was delay in giving the property trust status. The tribe has also apparently received BIA funds for an adult vocational education program.

Despite these gains, however, as noted in the case study, the overall "impact of Federal funding on the economic health of the community has been minimal." (For more specific information please refer to the Cow Creek Band of Umpqua Indians case study report.) We note, however, that the experiences of the Cow Creeks Umpquas are unique, likely to be transitory and thus, may leave a misleading impression of the relative impact of Federal acknowledgement. There can be little doubt that Federal recognition offers a critical precondition for dramatic changes in tribal well-being. Sovereignty is a powerful instrument in achieving community goals. Nevertheless, effective governance and good management are also essential for actualizing the potential benefits of recognition.

Having looked at the benefits and changes in economic health of the two case study communities who have already achieved recognition, let us now look at benefits in the other case study communities. Since recognition has not yet been achieved for these communities, it seems appropriate to attribute these benefits, at least in part, to the status clarification process itself. To a significant degree, these benefits are also a direct outgrowth of ANA support to the communities.

We note that there is not necessarily a correlation between how far along in the status clarification process a community may be and how much it may have thus far benefited in terms of social and economic development. Two cases in point are the two tribes which have each completed one status clarification strategy, but which were also unsuccessful in gaining Federal recognition via those strategies. These two tribes are the Mashpee Wampanoag Tribe and the Samish Tribe of Indians.

In an effort to establish a judicial claim that land had been wrongfully taken from them as a tribe, the **Mashpee Wampanoag Tribe** of Massachusetts, filed suit in 1976 against the town of Mashpee, the New Seabury Corporation (a major developer in the town) and other property owners. In 1978, the adverse judicial finding was that the Mashpee Wampanoags were no longer a tribe and thus were not entitled to even make a claim. As noted elsewhere, this was the only case where a tribe was subjected to a clarification of status as an Indian tribe as a direct outgrowth of a judicial finding. Despite this negative 1978 court ruling, however, the Mashpee Wampanoags are now involved in seeking recognition through the FAP process. After losing their court case in 1978, the Mashpee Wampanoags received approximately $717,949 in Federal funds between 1978 to 1984. This is an annual average of about $106,000. These funds primarily came from the U.S. Department of Labor (DOL) Comprehensive Employment Training Act program, the U.S. Department of Energy, and ANA funds for various social and economic development initiatives (over and above status clarification work). Additionally, an aquaculture enterprise (for seeding, harvesting and marketing clams and oysters), which was supported in part with either ANA or CETA funds, was found by the study team to soon "be mature enough to be commercially profitable." (For more information refer to the Mashpee Wampanoag case study report.)

The most salient point of the Mashpee Wampanoag case is the inherent risk in pursuing judicial actions. It seems safe to say that had the Mashpee Wampanoags not lost their court case, they would probably have been further along in terms of community economic and social development. Since losing the case in 1978, the tensions and hostilities between the tribe and the non-Indian community have been considerable. The tribe unequivocally asserts that many of their economic initiatives have been thwarted and/or actively impeded by officials now controlling the town government or by powerful local businesses. As a result, the potential benefits for community members have been minimized.

Located in Washington, the Samish Tribe of Indians, which was not successful in gaining Federal recognition through the FAP process but is hoping to have recognition legislation introduced, also presents a lesson for other unrecognized groups with respect to the great risks involved in status clarification. The study team concluded that the "impact of status clarification efforts on the economic well-being of tribal members has only slight relevance in the Samish Case." From 1982 to 1987 the tribe's efforts were primarily directed at reversing BAR's proposed finding to deny them acknowledgement as a tribe. As a result, from the limited information the study team could locate, from 1983 to 1986 the tribe's funds were sporadic, limited to less than $10,000 per year, and more frequently, less than $5,000. Nevertheless, since FY 1985, through ANA and locally generated funds (e.g., $33,000 from a church group), the Samish Tribe has developed several economic ventures, which although limited, have provided some benefits to the tribe and its members. One venture is the Northwind Trading Company, which is a low capital cottage industry focused on manufacturing sweaters and other knitted products for international export and trading. The enterprise employs one person as a manager and trains/buys from at least 28 Samish "home knitters." This business is now self-sufficient. Another tribal enterprise is the Potlatch Gifts which operates an art gallery and giftshop featuring fine art as well as arts and crafts produced by tribal members. This business, while employing only one tribal member, serves as a distribution outlet for several other tribal members. However, the enterprise is not yet self-sufficient. Another interesting economic outgrowth of the tribe's status clarification effort is Northwind Enterprises, which operates a contract archeology team consisting of a professional archeologist and six crew members who are tribal members. ANA funding has been instrumental in each of these tribal enterprises, and has played a central role in planning and implementation.

In addition to the above cited specific economic ventures, in 1983 and 1984 the Samish prepared a Comprehensive Economic Development Plan with ANA funding. Planned at two different seaside sites are two cultural centers which will offer museum exhibits and gift shops. One center will also include the offices for Northwind Enterprises, which plans to operate a charter boat service at that location. (For more information, please refer to the Samish Tribe of Indians case study report.)

We have found that the relationship of success in the status clarification effort to other social and economic development (SEDS) efforts is tenuous at best. Since the proportion of ANA grantees (in and out of the study sample) with successful status clarification outcomes (i.e., gaining Federal recognition) was rather small, a specific part of the evaluation design focused on looking at grantees in terms of successful completion of various status clarification tasks. To do this, the case study sample used, among other variables, the stages of progress with respect to FAP petition development. Two grantees in the case study sample group were *awaiting active consideration* of their documented petitions, after having responded to OD letters. As discussed below, the benefits derived from the status clarification effort differed significantly between the two groups.

The **Abenaki Self-Help Association**, the corporate body of the Abenaki Tribal Council located in Vermont, has been quite successful in jointly pursuing status clarification along with social and economic development. The tribe is currently awaiting active consideration by BAR. While conducting the research to both complete its documented petition and to answer questions posed by BAR, the tribe has also undertaken numerous social service, housing and economic initiatives which have resulted in direct benefits for tribal members. For the period 1980-1984, the tribe accessed nine Federal programs for at least 24 grants, six State programs for 11 grants, and four grants from local or private agencies. The Federal agencies included the Community Services Administration - - Community Food and Nutrition Program and the Emergency Crisis Intervention Program; HUD - - Housing Subsidies Program, Rental Subsidies Program and the Self-help Housing Program; DOL - - Office of Indian Programs and CETA; Office of Community Services; U.S. Department of Education - - Indian Education Programs; and Volunteers in Service to America (VISTA). In addition to funding for its status clarification effort, it has also had almost continuous ANA funding since 1982 for various SEDS initiatives. ANA funds have leveraged these other sources of money, such as from HUD, to initiate (1) Abenaki Acres, a housing development with several units serving tribal members; and (2) Abenaki Enterprises, a construction company that bids on local and State contracts, and which has now become self-sufficient. The tribe has also helped with establishing four businesses owned by tribal members. In 1980, the tribe attempted to establish a commercial eel fishing enterprise. Unfortunately, this venture did not prove profitable and was ultimately closed down.

Since 1976, the tribe has gradually expanded into seven administrative components. These are manpower training, economic development, education, research, housing, alcohol and drug abuse, and social welfare. In addition to its economic ventures, Abenaki has, through access to Federal and State social service programs, provided a range of services to benefit members. All of these initiatives have occured simultaneously with the tribe's status clarification activities, a salient lesson to be noted by other groups. Moreover, the Abenaki case study points out that although a group's relationship with a State may not always be positive, that group can still access State funds if (a) planning and documentation of needs are in place and (b) the group has a good track record with respect to implementation of programs/services. These two factors appear to have been particularly relevant to Abenaki's successes.

Like Abenaki, the **Jena Band of Choctaws**, in Louisiana, now have their petition awaiting active consideration by BAR staff. Unlike Abenaki, however, their status clarification effort has been the primary focus of their community development. The tribe has, in fact, deferred extensive economic development initiatives until such time as their status clarification process has been completed. The Jena Band of Choctaws are a very isolated and small community, affected somewhat by the economic downturn in the local oil and forest industries. Funded by ANA for the first time in FY 1984, the tribe has received, cumulatively through four grants, $211,165 of ANA money. Approximately half of this has gone into status clarification and the rest into economic development planning. While there is no tribal budget per se, except for the $1,752 annual rental charge to the Joint Training Partnership Act (JTPA) program, the Jena Choctaws have taken advantage of community volunteerism and has taken the lead in conducting a number of human service activities for tribal members, e.g., assisting individual members with completing high school, job training, and procuring health care through local agencies. Since the commencement of status clarification and SEDS initiatives, the tribe has also tried to leverage funding for an automotive service center as its first tribal enterprise. It has applied to the Farmers Home Administration for $450,000 but needs to raise an additional $150,000 costs for the enterprise. To do this, the tribe is currently contemplating mortgaging the tribal center to gain funding or they may attempt a joint venture with another Louisiana tribe. In terms of recent economic benefits, the tribe is able to showcase a HUD-funded tribal center and an adjoining recreational area. The Jena Band is also considering two other ventures, namely, a tribally owned day-care center and/or a bakery in the local township of Jena. They are quite active on the State Indian Commission and as the study team noted, "have familiarized themselves with various opportunities open to the community . . . [which has] led to the community viewing itself as viable for social and economic development."

When one looks at the various benefits derived from ANA support of various groups seeking clarification of their tribal status, it is interesting to note the contrasting commitments taken to the status clarification effort in relation to other community goals. Two tribes representing very different outcomes of ANA status clarification funding are the American Indian Council of Mariposa County and the Waccamaw Siouan Development Association.

In California, the **American Indian Council of Mariposa County**, with only two years of funding under the original status clarification mini-grant Program Announcement, was able to complete a documented petition for submission to BAR. As noted by the study team in the case study report, "without ANA funding there would not have been any possibility of the tribe receiving recognition." However, in terms of economic growth, there has been no significant change in the community although there seem to be many opportunities for small businesses catering to the local tourism industry. As further noted, "the tribe and its members simply lack the resources to capitalize." Although lacking in terms of economic endeavors, the tribe makes a strong effort to meet members' needs through networking with other agencies, neighboring tribes and Indian organizations. The tribe has benefitted by developing a strong identity and was involved in establishing a State-funded *All-Tribes* Counseling Center to provide a "counseling program offering counseling and community services, incorporating respect for American Indian Values." The tribe is well respected at the State and local levels, and sits on the board of the M.A.C.T. Indian Health Board Center, which, through an IHS contract, offers medical and dental services, community outreach, alcohol and drug abuse treatment services. The Mariposa group is the only non-Federally recognized member of the M.A.C.T. board (named after the tribes represented - - Mariposa, Amador, Calveras and Tuolumne).

In contrast to the Mariposa group, the **Waccamaw Siouan Development Association**, which has not yet completed a documented petition, seems to have already placed a major focus on strong social and economic development. Funded in 1982 by ANA *to research and complete a petition for Federal recognition*, the tribe is still working on completing research but surprisingly has not requested additional funding to do so. Instead, it has requested and used ANA funds to support various social and economic development efforts and to leverage other funds. From 1982-1984, the tribe received $480,602 from 26 different Federal, State and other sources. ANA funding accounted for only 22 percent of this total. Using ANA funding for planning, the Waccamaw Siouans were able to obtain assistance from the North Carolina Technological Development Authority to implement an aquaculture project with pond-sites on various tribal members' property. Starting with 12 participants and sites, the aquaculture project has recently expanded to 19, and 11 sites have been returned to individual owners for their own profit. The tribe used an FY 1987 ANA grant to develop further expansion plans and a business plan to include a processing plant. Ultimately, the Waccamaw Siouans hope to leverage the $700,000 needed for the project through various sources. Another tribal enterprise that has been developed is a mobile home rental development, which is soon to be self-sufficient. Additionally, the tribe opened the Wap-ka-hare Trading Post in 1988. It has been determined, however, that this tribal business needs to be relocated before it can become profitable.

Not only is the Waccamaw Siouan Development Association "moving toward its goals of tribal economic development," as the study team noted, but the service programs operated by the tribe have provided tribal members a wide range of services. Among the service programs offered are JTPA, day-care, chore workers, elderly assistance, rental housing assistance, and food and emergency services. Through the two nearby counties' Community Development Block Grant programs the tribe has also been able to establish tribal offices and other facilities. Thus, the benefits derived by the tribe can be well documented, regardless of the fact that progress in completion of status clarification tasks seems to have slowed down and no assistance for this effort has recently been solicited from ANA. The Waccamaw Siouan case study effectively demonstrates the value in good community planning. Effects of such planning is not only evidenced by the tribe's economic development but is also manifested in their approach to developing their FAP petition. The Waccamaw Siouians had a model research plan for their petition development.

The Brothertown Indians of Wisconsin are representative of another kind of unrecognized group. Although they have completed a documented petition, and in that respect are further along in the FAP process that the Waccamaw Siouans, they are not as far along in the process of developing a sense of *community* in line with the planning concept underlying the SEDS philosophy. The Brothertown Indians are a diffuse group with about half of their members in two communities (one rural and the other urban) and the rest spread all over Wisconsin and other states. In this regard, they are like the Northern Cherokee Tribe of Indiana and Arkansas, the Miami Nation, the Little Shell Tribe of Chippewa Indians, and a few others. Due to the broad dispersion of their membership, they have no tribal enterprises or administrative capacity in place other than the active tribal and general councils, which meet once a month. The Brothertown Indians have thus far focused all of their efforts on development of their petition. Their status clarification effort involved the mobilization of a vast network of tribal members, who as volunteers were able to collect a great amount of material in a relatively short time, basically from late 1983 through mid-1985. Other than ANA funding for their effort, they were able to only access $2,600 from other sources. However, their membership's contributions from 1981 to 1984 amounted to $115,000. The following year, in 1985, in one month the tribe reported contributions of $6,757 and 726 volunteer hours.

### 2. Other Benefits and Outcomes

Status clarification activities have both direct and indirect effects on social relations among tribal members. Frequency and quality of social interaction is, in turn, related to other aspects of social and economic self-sufficiency of the groups in question. Active efforts in pursuit of Federal acknowledgement have had some highly positive effects on group morale in many of the communities studied. Insecurity in these communities' identity as Indians is partially allayed by the prospect of legitimization. In addition, the tasks required in doing the research bring people together and foster participation in tribal activities. Data obtained from the research often have provided a basis for both designing and funding social services and cultural activities, all of which enhance contact, familiarity, and a sense of common identity.

On the other hand, the difficulties involved in successfully obtaining acknowledgement can have corrosive effects when things go wrong. Internal strife and demoralization occurred in both the Samish and Mashpee Wampanoag tribes following denials of their tribal status (by BAR and in court, respectively). More generally, however, the very demanding and costly nature of acknowledgement research puts a strain on tribal staff and administrators, and can be highly frustrating for all involved. Status clarification activities generate important issues about which there is bound to be disagreement among tribal members and between tribal factions.

It is important to emphasize that factionalism is endemic in all communities, including Indian communities. Strife over the conduct and outcomes of acknowledgement efforts is not uniquely related to status clarification, and is not an indication that these communities either lack "social cohesion" or have lost social cohesion as a result of pursuing status clarification objectives. However, it is equally important to point out that these conflicts can frequently have a debilitating effect, and thus, ANA should strive to help grantees avoid needless problems due to funding gaps and/or inadequate technical support.

In terms of the State support and respect gained by a tribe as a result of the status clarification effort, we can state that in three-fourths of the cases there was substantial State support. The Wisconsin Governor proclaimed October 1982 - 1983 as the *Year of the Brothertown Indian* and recently, the tribe has indicated that the State's Congressional delegation may consider introduction of recognition legislation. The Poarch Creeks had the support of the Congressional delegation for its status clarification effort, in the event it chose the legislative route rather than the FAP process. Furthermore, early in the Poarch Creeks' effort, the Alabama Governor indicated to BAR that the State would give the tribe land to be put into trust should the tribe be Federally recognized. Presently, the Poarch Creeks are the only Federally recognized tribe represented on the Alabama Indian Affairs Commission. One other tribe in our study sample (the Mowa Choctaws) also sits on the Commission (which also includes the MaChis Creek Tribe, a group that was recently denied acknowledgement by BAR). The Cow Creek Umpquas had the support of the Oregon Congressional delegation in introducing not only their recognition legislation but other legislation needed to clarify their position in disputes with the BIA.

Other States that have Indian Affairs Commissions comprised at least partially of Federally unrecognized tribes are Louisiana, North Carolina and Massachusetts. The Waccamaw Siouans and the Jena Choctaws both have benefitted from strong State support. The Louisiana Institute for Indian Development conducted a demographic and needs assessment of the Jena Choctaws. The data from the report were used in the tribe's FAP petition development. The Waccamaw Siouans receive much financial support and technical assistance from the State agencies. This has been particularly useful for their economic planning and project development. The Mashpee Wampanoags sit on the State Indian Commission. (However, as noted in the case study, in 1982, the Commission budget was temporarily halted as an outgrowth of the tribe's suit against the city of Mashpee.)

Although many tribes have experienced improved relations with State and local officials, others have encountered problems directly attributable to their status clarification efforts. The Mashpee Wampanoags are one example; the Abenakis are another. The Abenakis have become increasingly vocal about sovereignty and treaty fishing rights, and the State government has responded by retaining one of the same law firms that opposed the Mashpee Wampanoags in their land suit. Similarly, the State attorney in the State of Washington has consistently opposed recognition of the Samish and other ANA grantees in the State. Lack of State support has greatly hindered these tribes, but their inability to win such support is due to inherent conflicts of interest, rather than any kind of failure to conduct status clarification activities appropriately.

It should be noted that, even in those cases where relations with the States are the most strained, status clarification activities have usually resulted in improved relations with local non-Indians, both in the public and private sectors. A common example is participation by tribes in local "founders' day" festivities and similar community programs. Collaborative arrangements in social service delivery have also helped to establish links with surrounding communities. Of great importance in many cases, research done for status clarification has supplied valuable documentation about the authenticity of a group's claimed origins. A very common feature in unrecognized tribes is public skepticism about whether they are "real Indians." Data collected for petitions also serves as evidence answering such doubts, which in turn enhances self confidence and reduces some of the strain in dealings with non-Indian neighbors.

In conclusion, we note that the benefits derived from the status clarification process are ultimately dependent on a group's ability to plan, implement and manage its resources in an efficient and effective manner. For ANA's purposes, we make a distinction between administrative capacity-building and strengthening of governance structures, which has been a touchstone of the SEDS philosophy. Many of these groups may have strong governance structures, e.g., active tribal councils, tribal constitutions and by-laws, and to some degree may be involved with state and local governments in formal or informal jurisdictional relationships, e.g. the Jena Choctaws relationship with parish officials (please refer to the case study). However, unlike Federally recognized tribes, these groups lack the basic operational funds to administratively plan and implement programs. Some have been more successful than others at accessing available resources to serve tribal members, but all of the groups have experienced difficulties in developing their administrative capacities.

## IV. ISSUES AND RECOMMENDATIONS

### 1. How can ANA alter its application review process as well as its application guidelines to ensure better quality proposals for status clarification?

From close review of ANA's FY 1981 - FY 1988 status clarification grants, we conclude that ANA might obtain greater impact from its funding if it were to make changes in the application review process and with respect to the guidance provided to applicants. We recommend that the following points be considered by ANA.

It is apparent that grantees are often writing status clarification objectives which are totally unrealistic. This may occur for one of two reasons. Applicants either (1) are ignorant of the complexity and quantity of research data needed for the FAP process and, thus, are genuinely naive when developing their ANA objectives, or (2) perceive ANA as being more receptive to their applications if the objectives indicate the completion of recognition within a project period. In fact, information collected throughout this evaluation study indicates that both of these factors have applied to ANA projects in the past. The end result has been that too many proposals funded by ANA have been unrealistic in terms of anticipated outcomes for the specified grant period. In other words, many of the ANA supported status clarification objectives have gone unmet. Our analysis demonstrates that at least 34 percent of the study sample grantees fell woefully short of accomplishing their stated objectives in a given year. In fact, 12 percent of the grantees repeated the same unrealistic and unaccomplished objectives year after year. Apparently the application review process had no mechanism to detect the flaws in the objectives during the first go-around, let alone note that the same objective was being repeated and was again unmet in subsequent application cycles. Given these findings, we make the following recommendations:

- It would be useful if ANA had individuals familiar with the FAP process review its status clarification applications.

- ANA's application review process should include more rigorous assessment of the reasonableness of the applicant's projected year-end outcomes.

A determination of how realistic the objectives are cannot be made unless the review process involves individuals who are quite familiar with the steps and intricacies involved in the various status clarification routes. To approve objectives which are clearly unrealistic is as much a disservice to the grantees as to the funding agency.

In addition to improving the application review process, we also believe that:

- ANA would be better served were it to provide greater guidance in its actual program announcements. Ideally, this could be most efficiently managed were ANA to publish separate program announcements in support of its Status Clarification Program.

While we realize that ANA has moved away from this approach and is now publishing only SEDS program announcements, which are general enough so as to accommodate all types of ANA program strategies, the uniqueness of activities associated with status clarification may warrant ANA's reconsideration of this approach. Were a separate status clarification program announcement published, ANA would have greater latitude in specifying the need for true *research plans*, i.e., plans that not only identify which steps need to be taken (be it for FAP, preparation of a court case, or pursuing legislation) but that also ensure that the steps would be logically sequenced so as to maximize good use of time and money. The program announcement could then be used to alert groups to the complexity of status clarification strategies and the need for developing realistic long range planning.

While ANA does require evidence of such planning in the context of, in particular, its economic development initiatives, an analogous emphasis has not been placed on status clarification applications. Similarly, while ANA does not usually fund regular SEDS applications which are focused on economic development without accompanying justification of, for instance, labor or product market potential or some type of feasibility study, the status clarification applications appear to be reviewed with no comparable requirements of prior conceptualization. Rather, "good faith" and the basic desire for recognition as a general goal often appear to be enough to warrant ANA support. The lack of specificity with respect to how grant objectives will be accomplished was a factor in over 75 percent of the applications reviewed during this evaluation study. The dearth of substantive activity and timeline information was truly noteworthy. In cases such as these, the success of a given grantee primarily depended on whether or not the community had the foresight or capacity to approach its recognition efforts in a logical and systematic manner.

We make the following recommendation to ANA:

o In addition to greater guidance contained in the actual program announcement, ANA should provide other supplemental information as part of its application package. Specifically:

(a) a brief overview of status clarification routes, denoting specific merits and qualifications regarding each and specific steps which are implicit in pursuing each;

(b) a brief summary of this study's analysis of the time frames involved in conducting research and completing the actual process for the various status clarification routes, particularly FAP. Currently, grantees seem to view completion of a documented petition as the culmination of status clarification research, when in fact follow-up research and compilation of additional documentation can extend several years beyond submission of a documented petition stage (as noted throughout this report). Furthermore, the actual time from submission of a documented petition by a group to the issuing of a finding by BAR, is usually over four years. In the one study case of a negative finding, this period was over seven years.

(c) an outline of essential elements that should be included in each group's research plan, with discussion/guidance of the relation of those elements to the writing of a documented petition, including realistic time frames for completing each section of the petition.

We also make the following additional recommendation:

o ANA should encourage more of its status clarification applicants to apply for multi-year rather than single year funding.

Obviously the status clarification process is a lengthy one. While we recognize that most of ANA's regular SEDS funding is also directed toward projects which require more than one year of funding to reach completion, the need for follow-up funding was virtually always needed for the status clarification projects included in our study sample. It is abundantly evident from the data we have collected that most status clarification communities whose ANA support was curtailed mid-stream in the petition development stages, or in collecting supplemental documentation for response to an OD Notice, literally ceased substantive work on their status clarification efforts. The debilitating effect of this loss of momentum is considerable. Perhaps, most importantly, is the fact that a funding hiatus can frequently cause the loss of a key researcher who is then unable to return when funding is resumed. The continuity of a good researcher can literally, in some cases, make the difference between a successful and unsuccessful petition. Multi-year grant awards would help alleviate these problems.

**2. What type of coordination needs to occur between ANA and BAR staff?**

Since over 90 percent of ANA's grantees are using the FAP route for clarifying their status as tribes, it would seem imperative that a strong and on-going coordination effort exist between ANA and BAR staff. In the late-1970's and early-1980's, this type of coordination was seen by ANA as a vital step in both formulation and execution of its Status Clarification Program strategies. Not only was the BAR staff consulted in the shaping of ANA's program philosophy, but the ANA-funded Resource Mobilization Project worked closely with individual staff members of BAR. However, this linkage and sharing of information has apparently now grown far less regular and effective. Since we are aware of a renewed interest in activating this coordination and of recent meetings which have occurred between ANA and BAR staff, we wish to reinforce the imperative nature of this effort.

As noted throughout this report, the FAP process is lengthy, complex, and definitely requires the involvement of professional experts with respect to research and, in some cases, legal interpretations of historical events. The BAR staff can and does serve as a resource for questions and points of clarification emanating from petitioning communities, particularly during preparation of the documented petition. As a result, BAR staff is cognizant of problems or concerns which petitioners are facing and can offer guidance for particular areas. For individual ANA staff, regular communication with BAR would lead to increased familiarity with (1) the overall FAP criteria, (2) the extent to which documentation is required to meet those criteria, and (3) the basic stages in the FAP review process. In turn, this increased familiarity would assist ANA staff in effectively monitoring grant implementation. Moreover, were ANA more aware of the complex research problems facing a specific community, the agency would be better able to assess the appropriateness of the project objectives which it funds. Similarly, based on information exchanges with BAR staff, ANA could then suggest to grantees realistic and valuable revisions in objective statements which could result in a greater impact of ANA funding.

In summary, regular coordination with BAR would keep ANA staff apprised of the status of individual grantee petitions as their FAP review proceeds. This, in turn, would enable ANA to work more closely with and provide greater guidance to petitioning communities. For instance, the Poarch Band of Creeks, through its own contacts with BAR staff, was aware of many of the points raised in its OD letter prior to actual receipt of the letter. Thus, it had begun collecting the necessary documentation with the support of ANA funding before being formally apprised of the need to do so. In the cases of groups who, unlike Poarch, do not keep in contact with BAR, ANA could serve as the intermediary with respect to being the purveyor of information which could have significant bearing on the more effective use of ANA resources.

### 3. What is ANA's role when a grantee's status clarification effort has had a negative outcome?

The answer to this question will vary depending on the community to which it is applied and the steps which that community has taken to date with respect to its clarification of status as a tribe. Although one status clarification strategy has been exhausted by a group, there may still be viable options. The Samish Tribe, for instance, has evidently exhausted Federal recognition through the FAP route, having been declined in May 1987. However the tribe is currently exploring a possible legislative alternative which appears to have reasonable likelihood of success. Therefore, in Samish's case, a new status clarification grant application should warrant ANA consideration for funding.

In general, however, once a group has had a negative outcome via one strategy, a critical factor that ANA must consider in its decision about whether or not to continue status clarification funding, is whether or nor the applicant community has at least a modest likelihood of success. For example, if an ANA grantee has been declined Acknowledgement through the FAP process on the basis of the petition not meeting any of the substantive FAP criteria, then it may be impractical for ANA to provide this same group with a grant to seek Federal recognition through legislation (in view of the fact that Congress has indicated that it will be heavily relying on the FAP criteria for guidance in its own recognition decisions. Thus the declined group in question would face the improbable task of needing to find extensive and substantive new supportive data in order to fare any better through the legislative route.)

Difficult as the judgement would be for ANA to make, at some point ANA must, based on its own review of potential status clarification options and the requirements and/or necessary supportive data required for each, decide whether it can realistically expect any positive results of continuing to support a community's status clarification efforts. Since ANA's legislation permits it to fund unrecognized communities, denial of support for status clarification objectives does not, of course, render the group ineligible for other types of ANA funding. The judgement call ultimately comes down to asking what options or use of ANA money will have sufficient impact on community members to warrant support? ANA dollars are, after all, competitively awarded. An applicant must demonstrate, therefore, a realistic likelihood of benefits to its community, whether it be through status clarification or regular SEDS objectives.

**4. What are the basic elements that ANA should look for when assessing a grantee's research plan for conducting status clarification research?**

Although conditions vary from one community to the next, a basic plan for conducting status clarification research should include the following elements:

I. Document searching in local, State, and national repositories.

Acknowledgement petitions require substantial documentation, that may often be difficult to acquire. The historical origins of the petitioning group, continuity of group existence, evidence of Federal contacts, external verification of Indian identity, are all requirements in the criteria for which documentation must be supplied. Relevant documents may be found in diverse locations, and research plans should provide for travel expenses and reflect a good understanding of archives. This work is typically the province of historians or anthropologists (ethnohistorians), and it is important that documentary research be done by someone with appropriate skills.

II. Development of genealogical charts for all adults listed on the tribal roll.

This can be a very time-consuming activity, especially for tribes with many members. The charts must be complete, accurate, and in accord with the group's own membership criteria. Genealogies will form the basis for BIA determination that the group meets criterion e. This is very important, and should be prepared with the assistance of a trained genealogist, preferably one familiar with Indian sources.

III. Oral histories with tribal elders and other individuals familiar with the tribe during earlier generations.

Oral history, in which verbal recollections are elicited, is in most cases an indispensable part of the research. There tends to be a dearth of documentation about the everyday lives and leadership patterns of unrecognized tribes. The collective knowledge of tribal elders can supply missing information and provide clues about where to look for documents. Oral history has methodological limitations, however, and will not by itself supply adequate data. Anthropologists or historians usually have the kind of training and experience to conduct this kind of research, but it may also be that tribal members can do a better job of establishing needed rapport. A productive approach often combines tribal researchers who do the interviewing and professional consultants who guide the questions and interpret the responses.

## IV. Collection and assembly of information about leadership, decision-making and community life among the current tribal members.

The acknowledgement criteria require that petitioners demonstrate that their groups remain ethnically distinct from surrounding populations, that the members are joined in an active "community," and that there is an ongoing leadership structure whose authority is recognized by the tribal members. A consistent weakness in petitions submitted to BAR thus far has been lack of sufficient data on the contemporary tribal community. An effective acknowledgement research strategy must include plans for collecting and analyzing sociological, demographic, and ethnographic data. The involvement of a well-trained and experienced anthropologist is strongly recommended.

The above activities should proceed in tandem, and ideally reflect a division of labor among an historian/ethnohistorian; a genealogist; an ethnographer/sociologist; and tribal researchers. Research should be conducted with full knowledge and collaboration of the tribal government, and contracts with researchers are strongly recommended. Systematic coordination among the different researchers on the team is very important, as is overall management of the petition process. Data storage and retrieval systems should be implemented, and a time-table established for the accomplishment of specific research tasks or products.

Of course, the time required to complete petition research will vary depending on several factors. Among these factors are:

- Size of community - - the larger the group, the more complex the research required to document it.

- Longevity of sustained contact with Europeans - - the more distant the origins of a group, the more difficult it is to secure adequate documentary evidence. Oral history is of limited value for such remote periods.

- Relative dispersion of the tribal membership - - when residential patterns are clustered, research is logistically easier and communities are more easily described. The more scattered the members, the more difficult the process.

- Extent to which relevant research has already been done by academic historians and anthropologists - - if data have already been collected and published, new data collection activities may be reduced (provided the quality of the research is acceptable).

- Previous contacts with the Federal government - - the more there have been, and the further back they extend, the easier it is to complete a petition.

- Availability of capable personnel to do the research - - groups located near large cities, or large universities, are more likely to be able to obtain the assistance of qualified historians or anthropologists.

5. **What are the benefits derived from State recognition and are there any groups that are satisfied with having achieved only this status?**

First, it should be noted that only one grantee in the study sample of 35 communities made reference to using ANA funds to seek State recognition. Additionally, it appears that none of the study sample groups which already have State recognition are satisfied with that status, since virtually every one of these groups is currently in some stage of seeking Federal recognition. We conclude from this that the benefits derived from being a State recognized tribe are minimal with respect to producing substantial social or economic impact on a given Indian community.

The benefits of State recognition, of course, do vary to some degree from one State to the next. Moreover, not all States even have a process or procedure by which they confer recognition to groups. However, for those groups who have obtained State recognition, the benefits from State resources have been largely intangible. In some cases, State recognition results in eligibility for a tribe to have one of its members sit on the State's Commission on Indian Affairs. However, few Commissions have actual resources to disperse to Indian communities (and those that do, have very minimal funds). Often, State Indian Commissions do serve in a valuable capacity by bringing to the State's citizenry an awareness of the State's Indian population, its needs, and the contributions made by that population. This increased visibility can result in an increase in general services and/or revenue to an Indian community from both government (State, County and/or local) and private sector resources. Technically, however, these services or programs are usually available to the community anyway, whether the group is State-recognized or not. The increase in the community's visibility simply serves as the catalyst for directing these resources specifically to an Indian community.

A less tangible but just as important benefit of State recognition is the resultant increase in sense of identity, self-esteem and sense of cohesion among the Indian community members themselves. In some respects, this increase in community spirit can itself serve as a powerful backdrop for mobilizing the group into deciding to pursue Federal recognition.

With respect to increased Federal benefits as a result of State recognition, here too, the direct benefits are few and are largely restricted to State-recognized tribes who have a land base. In the document entitled "Federal Funding Sources for American Indian Tribes," which was prepared by ORBIS under this contract, several Federal programs are cited for which State-recognized tribes are either potential grantees or beneficiaries of services. However, these programs largely fall into two categories: one category cites State-recognized tribes as eligible recipients, but similarly includes unrecognized groups thus conferring no special status to the State-recognized groups. The second category cites State-recognized tribes as eligible recipients, but only those tribes with State reservations (thus excluding about 90 percent of State-recognized groups nationwide).

In summary, there is little evidence that State recognition as an end in itself (unless accompanied by the conveyance of a land base) results in significant social and economic development benefits as defined and espoused by ANA. At best, its primary value stems from serving as a stimulus for greater community cohesion, which in turn may spark a greater interest in seeking Federal recognition for a community desirous of obtaining the more tangible social and economic development benefits that are associated with a special relationship with the Federal government.

### 6. Are the IRA half-blood community route and the judicial route for status clarification any more effective (than FAP or legislation) in pursuing status clarification?

The IRA half-blood community route does not seem particularly operational since the BIA has not promulgated any specific procedures for implementing it. Rather, it appears that DOI defers to the FAP process for any petitioners not disqualified from pursuing FAP. On the other hand, the judicial route, as evidenced in our Mashpee Wampanoag case study, is extremely risky and can ultimately be harmful to an already tenuous relationship between a tribe and its surrounding non-Indian community. Just as importantly, the judicial route is likely to be extremely expensive. The Mashpee Wampanoag Tribe spent an estimated $500,000 on the court case. Likewise, the defendants, i.e., the town of Mashpee and the New Seabury Corporation, estimated that they spent over $1.5 million on their legal defense. Given what we know about the Mashpee case, which is thus far the only example of a group whose status as a tribe was clarified through judicial action albeit adversely and unintentionally (on the part of the tribe), a tribe considering taking judicial action would clearly need to also consider the potential cost of such an endeavor. It would also need to consider the opposing side's potential resources or access to resources. Equally important, would be the need for the group to thoroughly review the possible ramifications of choosing such an action and determine whether the community could afford (politically, socially, as well as financially) to lose.

Regarding the IRA half-blood community route and the judicial route, we recommend:

- ANA should inform potential status clarification grantees of the potential problems arising from either route, although technically available to unrecognized groups. The IRA half-blood community strategy is likely to be unfruitful and not cost-effective; taking a judicial action has risk and cost factors that need to be considered very seriously before being actively pursued.

7. In the case study group of nine, is there a relationship between the degree of SED's development and certain aspects of governance capacity?

Across the nine case studies, the governance issue was an important factor in making progress in status clarification and economic development. The nine case study tribes can essentially be characterized into two categories with respect to longevity of governance:

(1) groups that have had formally instituted governance structures over a long term (e.g., Poarch organized in 1948, Samish in 1926, Cow Creek in the 1920's, Mashpees had control of the township government until the late 1960's); and,

(2) groups which have more recently formally organized (e.g., Brothertown incorporated in 1982, Mariposa in 1971, Jena in 1974, and Abenaki and Waccamaw both organized in the early 1970's incorporating shortly thereafter).

Generally, with the exception of Mashpee, the earlier organized groups can be said to have organized for the purpose of pursuing either land claims efforts or early attempts at legislative recognition. The later organized groups developed primarily out of the civil rights movement in the 1960's to assert claims to their rights as Indian people. Of these two categories, we can further identify subsets based on the groups' push for community social and economic development regardless of status clarification. Thus, we can roughly characterize these groups as shown below:

**Table 7: SEDS Development and Formal Organization**

| | Strong SEDS Development | Limited SEDS Development | Non-SEDS |
|---|---|---|---|
| Long-Term Organized | Poarch | Samish<br>Cow Creek<br>Mashpee | |
| Short-Term Organized | Abenaki<br>Waccamaw | Jena | Brothertown<br>Mariposa |

By SEDS orientation, we mean the relative degree to which the group has developed a strong administrative capacity (e.g., the organizational structure/capacity to actually provide or arrange for provisions of services directly to members) beyond pure governance functions (e.g., dealing with issues related to membership/organizational definitions). We can use this matrix to aid our understanding of the relationship of governance structure and social and economic development, especially by examining those grantees at the extremes (e.g., Poarch, Brothertown, Mariposa).

In the case of Poarch, there has been a strong social organization and group cohesion that dates back to the early 1930's; this is evidenced by the relative stability in leadership over time and the implementation of (a) effective administrative structures to handle anticipated growth, and (b) a structured planning process. In the case of Brothertown and Mariposa, there has been stable leadership. However, these two communities are diffuse and the organizational structures needed to administer growth are not yet in place. The focus of these two groups has largely been directed at status clarification and petition development.

Furthermore, one can argue that longevity may not necessarily be a sufficient and/or essential factor affecting individual group progress with respect to SEDS development. Both Abenaki and Waccamaw have used ANA funding to coordinate status clarification as well as for numerous other SEDS initiatives development. In contrast, Samish, Cow Creek and Mashpee (who have older governmental structures) have only recently begun to use ANA money for instituting the organizational/administrative capacities to develop social programs and to establish economic enterprises. Moreover, each of these three communities has experienced serious problems or setbacks as a result of their status clarification efforts. Samish, after waiting almost eight years for the FAP process to conclude, was ultimately denied acknowledgement. Mashpee lost its court case and has, as a result, experienced traumatic problems with respect to interaction with the non-Indian population of the town. Cow Creek, although now recognized through legislation, has faced continuous disagreements with the BIA. These disagreements have seriously impeded the smooth transition into recognized tribal status with respect to receipt of Federal funding and services. These three cases make the point strongly that status clarification efforts can bring about disruptive and jolting outcomes for a community as much as they can bring about salutary and other positive outcomes with respect to future growth.

Ultimately, it appears that a group that has a strong administrative capacity, as evidenced by the number of programs directly administered and the types of social/economic development projects implemented, can also use that capacity to greater effect its petition development. A strong administrative capacity allows for effective coordination of existing status clarification resources, as well as mobilization of new resources. Further, there is greater likelihood that the group can tap community people to work on the status clarification effort and can disseminate important information on the status clarification efforts. For instance, Poarch not only used ANA funds for its petition development but also its own CETA and JTPA programs, plus funds garnered through the National Indian Lutheran Board and the State. Brothertown on the other hand, with little or no administrative capacity in place, relied primarily on ANA resources. Once ANA funding was gone, the group's administrative offices, which served as the Petition Coordination Center, closed and petition work largely ceased. Furthermore, with the closing of the Petition Coordination Center, there was no other administrative structure in place to seek other ANA status clarification resources or to undertake any SEDS related activities, including planning. Similarly, although Mariposa used an ANA grant to good effect to complete its document, once the ANA funding was over, and a documented petition submitted, there was no administrative capacity in place to mobilize new resources or to carry out any long range tribal development activities. In cases such as Brothertown and Mariposa, when an operative administrative arm no longer exists, the administrative responsibilities are placed on the officers of the tribe; this situation can then lead to other problems.

We conclude that ANA should encourage status clarification grantees, in conjunction with their recognition efforts, to develop stronger SEDS orientations with respect to Tribal Council/Board training, ensuring that effective management procedures/practices are in place and seeing that a basic administrative capacity is built.